LAW AND CONTEMPORARY PROBLEMS

EXPERT TESTIMONY

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EXPERT TESTIMONY

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FOREWORD

Contemporary the problem of expert testimony is, but new it most certainly is not. For the past half-century—to ignore earlier manifestations of discontent—the common-law method of eliciting expert opinion in the trial of cases has been a target of criticism by the scientists whose testimony has been sought. And the legal writings of the period—judicial opinions, bar association proceedings, treatises, and articles alike—demonstrate that the legal profession has been unable or unwilling to achieve that state of complacency toward the situation which has too often marked its attitude toward malfunctioning in the legal system.

It is regrettable, if not surprising, that this dissatisfaction which the two professional groups have shared in common has more often stimulated the acrimonious interchange of accusations than a striving for mutual understanding of inevitably divergent viewpoints. But there have been notable instances of the latter attitude, and here and there reforms have been effected which give promise of more noteworthy achievements in the future.

Today, as at no previous time, there seems evident a determination on the part of both the bar and the scientific professions to put an end to "the battles of experts" which have aroused the cynical skepticism of the public as to the integrity of both groups. Accordingly, it has seemed appropriate to present a survey of the progress that has been made and of the problems that remain for solution. Such is the primary objective of this issue, undertaken, it should be added, with the realization that the questions incident to the utilization of the services of the expert in the administration of justice are too many and too diverse to make their comprehensive consideration feasible within the limits of this symposium.

In *The Development of the Use of Expert Testimony*, Mr. Lloyd L. Rosenthal has traced the successive adjustments in legal procedure which the need for expert opinion has compelled and which in turn have shaped the method of eliciting that opinion which is employed today. There follows a series of articles dealing with an issue which has been a focal point of popular and professional discontent with the existing system—the determination of mental condition. Here, happily, the efforts for reform have been most fruitful, and in *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants before Trial*, Mr. Henry Weihofen surveys and appraises a group of legislative innovations designed to substitute scientific for forensic procedure in the determination of criminal insanity. The

most far-reaching of such measures has been singled out for special treatment. Dr. Winfred Overholser, in *The History and Operation of the Briggs Law of Massachusetts,* deals not only with provisions of that statute but also with the circumstances and conditions which led to its enactment and have contributed to its success.

In civil litigation, it is the will contest which most frequently requires resort to psychiatric testimony. The difficulties arising from the fact that the person whose mental condition is in issue is already dead are discussed in *Psychiatric Testimony in Probate Proceedings* by Dr. Harold S. Hulbert, whose observations, moreover, reflect the reactions of a psychiatrist to the workings of the courts.

Since the value of expert opinion can rise no higher than its source, the task of determining the qualifications of the expert is an important one. A significant attempt to insure the expertness of the expert in one field is described in *The Qualification of Psychiatrists as Experts in Legal Proceedings* by Dr. Israel Strauss.

The rapidly expanding volume of personal injury litigation makes an increasing call upon the medical profession for expert testimony. For the abuses which have developed, especially in large cities, Dr. Frederic E. Elliott and Dr. Ramsay Spillman, in *Medical Testimony in Personal Injury Cases,* have not hesitated to prescribe drastic remedies. Their proposals, which would materially alter the mode of trial of such cases, lend special relevance to Miss Ruth A. Yerion's discussion of the administrative handling of the problem in *Expert Medical Testimony in Compensation Proceedings.*

In psychiatric and medical testimony, the opinion of the expert is all-important, but there exist important fields of expert evidence in which the reasoning of the expert may be basic to the jury's appraisal of his opinion. The need for accommodating the rules of evidence to this fact is persuasively set forth in *Reasons and Reasoning in Expert Testimony* by Mr. Albert S. Osborn who has long held an authoritative position in such a field—handwriting evidence. Since the contributions of science to the problem of crime detection are progressively increasing the fields of evidence ot this character, the importance of the judicial attitude toward it is correspondingly enhanced. The current trend is depicted by Mr. Fred E. Inbau in *The Admissibility of Scientific Evidence in Criminal Cases.*

On the Continent the expert enjoys a position quite distinct from that of the expert in Anglo-American law. In *The Expert Witness in Criminal Cases in France, Germany, and Italy,* Mr. Morris Ploscowe not only depicts the expert's rôle but makes evident the fact that these nations have not as yet satisfactorily solved the problem of expert testimony.

A final article by Mr. Horace L. Bomar, Jr., discusses the thorny question of *The Compensation of Expert Witnesses.*

D. F. C.

THE DEVELOPMENT OF THE USE OF EXPERT TESTIMONY

LLOYD L. ROSENTHAL*

INTRODUCTION

The determination of a matter in litigation in the present system of administering justice depends on two things: (1) a finding that certain operative facts exist or existed; (2) an application of a guiding principle or rule to such facts, whereupon a final judgment is rendered. To accomplish the first of these there has been developed a highly technical set of rules comprising the law of evidence, the purpose of which is to select the material which should be considered by the trier of fact.

Thayer defines evidence as

"a term of forensic procedure [which] imports something *put forward* in a court of justice. . . . The law of evidence has to do with the *furnishing* to the court of matter of fact, for use in a judicial investigation."[1]

Wigmore analyses the meaning of evidence as

"Any knowable fact or group of facts, not a legal or logical principle, considered with a view to its being *offered* before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked."[2]

The theory of the law is that when such material or evidence is put before the trier of fact, the findings of fact will depend upon the conviction made upon the minds of a rational group of men. In other words, the finding of the operative elements of any litigated transaction depends upon the reasoning process of persons with the ordinary degree of knowledge and experience, who make necessary inferences. We find expression of this concept of the modern trial as early as *Bushell's Case*,[3] decided in 1671, where it is said:

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This article is based on a study prepared by the writer under the direction of John W. MacDonald, Executive Secretary and Director of Research of the Law Revision Commission of the State of New York.

[1] THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898) 264.

[2] 1 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (2d ed. 1923) §1.

[3] Vaughan 135, at 142 (1671). This case determined the independence of the jury in rendering its verdict. Bushell was one of a jury which acquitted two Quakers despite the direction of the presiding judge, who thereupon fined each juror. Bushell refused to pay the fine and was taken into custody

". . . a witness swears to what he has heard or seen . . . to what hath fallen under his senses. But *a juryman swears to what he can infer and conclude from the testimony of such witnesses by the act and force of the understanding.*"

Thayer says:

"Reasoning . . . the rational method of settling disputed questions is the modern substitute for certain formal and mechanical 'trials,' or tests, which flourished among our ancestors. . . . *But now when we use the phrase 'trial' and 'trial by jury' we mean a rational ascertaining-of facts, and a rational ascertaining and application of rules.* What was formerly 'tried' by the method of force or the mechanical following of form, is now tried by the method of reason."[4]

But frequently there arise matters about which the ordinary degree of knowledge and experience of the trier of fact is insufficient to enable it to make all the necessary inferences. Under such circumstances the requisite knowledge and experience must be supplied to the trier of fact. It is then that the expert witness is permitted to testify.[5]

An expert has been variously defined, both by writers and courts. Wigmore has identified the expert in connection with the subject matter of expert testimony:

"Secondly, there is that class of matters as to which it is only by means of some *special and peculiar* experience more than is the common possession that a person becomes competent to acquire knowledge."[6]

And he has also defined the expert in terms of ability to comprehend the nature of experiences falling within one's perception:

"That sort of capacity, which involves, not the organic powers, moral and mental, requisite for all testimony, nor yet the emotional power of unbiased observation and statement, but the skill to acquire accurate conceptions may be termed experiential capacity. The person possessing it is commonly termed Expert."[7]

An expert has been termed as

"one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same."[8]

Upon a writ of habeas corpus, it was decided that there was not sufficient ground to commit him; and he was set at liberty. Since then, juries have been free to render verdicts according to their own judgment.

[4] THAYER, *op. cit. supra* note 1, at 198-199. See, too, 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1926), at 133-139.

[5] We must keep in mind that an expert may testify to facts which he has been able to observe because of his special skill; from these facts the jury may then draw the conclusions. On the other hand, he may testify to an opinion on facts for which the jury has not sufficient experience to arrive at an intelligent opinion. See Dougherty v. Milliken, 163 N. Y. 527, 57 N. E. 757 (1900): ". . . in the one instance the facts are to be stated by the experts and the conclusion is to be drawn by the jury; *in the other, the expert states the facts and gives his conclusion in the form of an opinion which may be expected or rejected by the jury.*"

[6] 1 WIGMORE, *op. cit. supra* note 2, §556.

[7] 1 WIGMORE, *op. cit supra* note 2, §555.

[8] ROGERS, EXPERT TESTIMONY (2d ed. 1891) 2.

From the New York Court of Appeals we have it that

"an expert is one instructed by experience, and to become one requires a course of previous habit and practice, or of study, so as to be familiar with the subject."[9]

The expert's function is to supplement the premises upon which the reasoning of the trier of fact is based with those premises obtained from his experiential qualifications, thereby endowing the trier of fact with sufficient knowledge to understand the significance of the evidence and to make the inferences.[10] It is evident, therefore, that the fiat for expert testimony is necessity, born of the realization that the effective administration of justice requires aid from other branches of learning and science. As early as 1553, when our legal institutions were still in their formative stage, it was judicially noted that:

"If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an honorable and commendable thing in our law, for thereby it appears that we do not despise all other sciences but our own, but we approve of them, and encourage them as things worthy of commendation."[11]

It would serve no purpose to attempt an exposition of all the possible instances where expert testimony would be admissible. The only test which may be laid down with accuracy is that suggested by Wigmore: "On this subject can a jury from this person receive appreciable help?"[12] Some of the many matters upon which such testimony has been admitted are: medicine,[13] x-rays,[14] electricity and electric lights,[15] chemistry,[16] radio tubes,[17] nautical skill,[18] growth of trees,[19] handwriting,[20] operation of street car,[21] curative powers of a mineral water,[22] fingerprints,[23] ballistics,[24]

[9] Nelson v. Sun Mutual Insurance Co., 71 N. Y. 453, 460 (1877).

[10] Mayor v. Pentz, 24 Wend. 668 (N. Y. 1840); Ferguson v. Hubbell, 97 N. Y. 507, 513 (1884). See Hand, *Historical and Practical Considerations Regarding Expert Testimony* (1901) 15 HARV. L. REV. 40, 50-52.

[11] Saunders, J., in Buckley v. Rice, 1 Plowd. 125 (1554).

[12] 4 WIGMORE, *op. cit. supra* note 2, §1923. See also *In re* Wells' Will, 129 Misc. 447, 453, 221 N. Y. Supp. 714 (1927).

[13] Hickenbottom v. D. L. & W. R. R., 122 N. Y. 91, 25 N. E. 279 (1890); Young v. Johnson, 123 N. Y. 226, 25 N. E. 363 (1890); Stouter v. Manhattan Ry. Co., 127 N. Y. 661, 27 N. E. 805 (1891); Cross v. City of Syracuse, 200 N. Y. 393, 94 N. E. 184 (1911); *In re* Wells' Will, *supra* note 12.

[14] Marion v. Construction Co., 216 N. Y. 178, 110 N. E. 444 (1915).

[15] Prickett v. Sulzberger & Sons Co., 57 Okla. 567, 157 Pac. 356 (1916).

[16] San Marcos Oil Mill v. Soyars, 265 S. W. 173 (Tex. Civ. App. 1924).

[17] Bond Electric Corp. v. Gold Seal Electric Co., 244 App. Div. 206, 278 N. Y. Supp. 969 (1935).

[18] Walsh v. Washington Marine Ins. Co., 32 N. Y. 427 (1865).

[19] Ramapo Mfg. Co. v. Mapes, 216 N. Y. 362, 110 N. E. 772 (1915).

[20] Sudlow v. Warshing, 108 N. Y. 520, 15 N. E. 532 (1887); People v. Molineux, 168 N. Y. 264, 61 N. E. 286 (1901).

[21] Convery v. St. Ry. Co., 252 Mass. 418, 147 N. E. 824 (1925).

[22] Goodwin v. U. S., 2 F. (2d) 200 (C. C. A. 6th, 1924).

[23] People v. Roach, 215 N. Y. 592, 109 N. E. 618 (1915).

[24] People v. Fisher, 340 Ill. 216, 172 N. E. 743 (1930).

mental condition,[25] alteration of coat,[26] watertightness of cellar.[27] And but recently expert testimony was presented to the Surrogate of New York County dealing with the probability of inflation and the effect thereof on investments, upon a petition for authority to depart from "legal investments" and to invest trust funds in common stock.[28]

HISTORICAL CONSIDERATIONS

We have said that expert testimony is admitted because it is a necessity. In the early part of our legal history when a trial was merely a submission to a mechanical process of proof, there was no need of such information. A brief survey of the four older methods of trial will show that there was no place for either an expert, or even for a witness in the modern sense. In proof by *Witnesses*, a party produced witnesses to swear to a belief in his story. The essence of this process was the oath itself, not its probative worth. In *Compurgation* or *Law Wager*, a defendant denied the claim on oath in a set form. If he succeeded thereafter in obtaining a certain number of persons or "compurgators" to back the denial with their oaths, he would win. The theory of trial by *Battle* was that victory would be obtained not only by physical force, but also by the intervention of Providence on the side of right. And trial by *Ordeal* was a process of proof designed to provide for heavenly intervention by some sign or miracle which would determine the question at issue between the parties. In each one of these processes, the function of the court was simply to determine which party should submit to the selected form of proof and to see that the forms were observed.[29]

But with the development of the institution of jury trial and its gradual displacement of the older forms of trial, adjudications were becoming the result of the reasoning process of a group of rational men upon the information which that group had before it, rather than a mere submission to an essentially mechanical test. These early juries were not the juries we know today; rather they were bodies of neighbors, already acquainted with the facts or capable of discovering them easily, who partook of the character of witnesses as much as of judges.[30] There was then no settled practice of adducing information by means of sworn testimony of witnesses; "how a jury came by its knowledge was not originally a matter with which the law concerned itself."[31] This practice was not general until the 16th century when the distinction between witnesses and jurors was becoming clear. By the Act of 1562-1563,[32] there was provided for the first time a process to compel witnesses to attend and

[25] People v. Youngs, 151 N. Y. 210, 45 N. E. 460 (1896): *In re* Barney's Will, 185 App. Div. 782, 174 N. Y. Supp. 242 (1919).
[26] Moschowitz v. Flint, 33 Misc. 480, 67 N. Y. Supp. 852 (1900).
[27] MacKnight Flintic Stone Co. v. City of N. Y., 13 App. Div. 231, 43 N. Y. Supp. 139 (1897).
[28] *In re* Muller's Will, 280 N. Y. Supp. 345 (1935).
[29] See 1 HOLDSWORTH, *op. cit. supra* note 4, at 299-312, for an account of the older methods of trial.
[30] 1 HOLDSWORTH, *op. cit. supra* note 4, at 31, and 9 *id.* at 131.
[31] 1 HOLDSWORTH, *op. cit. supra* note 4, at 333-334.
[32] 5 ELIZ. c. 9, §12.

testify in the common law courts. These early jurors were expected to make their own inquiries. Indeed, a voluntary witness was for a good time a decidedly unpopular person in the law and was quite likely to be subject to the charge of maintenance and conspiracy. This antipathy to witnesses, Holdsworth explains, was caused in large measure by the ease with which facts could be invented, so that evidence, wholly perjured, was a common danger,[33] and also by the unsettled condition of the country because of which men of power would employ any means to influence a trial in their favor.[34]

When the jury as a rational body began to function as an integral part of the judicial system, there arose from time to time occasions when the tribunal had to have knowledge or information of a particular sort in order to decide the issues reasonably. It was the same necessity which today sanctions the employment of expert testimony. Under such circumstances there were two methods of obtaining the requisite specialized knowledge. One was to impanel a jury of persons specially qualified to pass judgment in a particular case; this was really a jury of experts. The second was for the *court* to summon skilled persons to inform it about those matters beyond its knowledge. If the court saw fit, it would then pass the instructions on to the jury or would be guided by them in making its own findings.

It is highly likely that the need of expert knowledge was first met by means of the special jury, inasmuch as the early juries were summoned from those acquainted with the matters in issue. During the 14th century there are many instances of juries summoned from tradesmen or craftsmen to decide questions dealing with trades or crafts.[35] Some of the matters upon which such juries were impanelled were: (1) whether the meshes of fishing nets were smaller than required by the trade ordinance; (2) whether hides were improperly tanned; (3) whether tapestry was false; (4) whether hats and caps were improper; (5) whether wine was false; (6) whether putrid victuals had been sold; (7) whether a surgeon was guilty of malpractice. A relatively recent example of a special jury is *Regina v. Anne Wycherley*,[36] wherein a jury of married women ("matrons") were impanelled to determine if the convicted prisoner was with child. This was the jury *"de ventre inspiciendo,"* the form of the writ for which Bracton in the thirteenth century set forth in *De Leg. lib. ii, fol. 69.* Holdsworth says:

"Such juries are perhaps the ancestors both of the modern special jury and the modern expert witness."[37]

But there are also early instances of the court summoning skilled persons to aid it on certain problems requiring a specialized experience to understand. In 1353, in

[33] 1 HOLDSWORTH, *op. cit. supra* note 4, at 334.
[34] 9 HOLDSWORTH, *op. cit. supra* note 4, at 179.
[35] See Hand, *supra* note 10, at 41-42 for a discussion of this method of obtaining specialized knowledge.
[36] 8 C. & P. 262 (1838).
[37] 1 HOLDSWORTH, *op. cit. supra* note 4, at 333. For further discussion of special juries, see THAYER, *op. cit. supra* note 1, at 94-97.

an appeal of mayhem, the court ordered the sheriff to summon surgeons from London to aid it in deciding if a wound was mayhem.[38] And in *Buckley v. Rice*,[39] it is recorded that:

"In 7 H.6 [about 1429] in a case that came before the judges, which was determinable in our law, and also touched upon the civil law, they were well content to hear Huls, who was a bachelor of both laws, argue and discourse upon logic, and upon the difference between *compulsione praecisa et causativa*, as men that were not above being instructed and made wiser by him."

Also cited in the opinion of Saunders, J., is

"a case where excommengement was pleaded against one, and the party said he ought not to be disabled thereby, because there was an appeal pending thereof, there the Judges enquired of them that were well versed in the cannon law touching the force thereof. [This was in 20 H.6, about 1442.]"

Thayer, in his *Cases on Evidence*,[40] tells of a case in 1493 (9 H. VII) wherein Brian, C. J.,

"alleged a precedent and the case was such: a man was bound in an obligation upon a condition to pay five pounds of fine gold. . . . The obligation ran *puri auri*. . . . And the masters of gramer were sent for to advise what the Latin was for 'fine,' and they could not tell."[41]

In *Buckley v. Rice*,[42] the question was whether the use of the Latin word *licet* made the plaintiff's allegation bad because it thereby lacked certainty. Said Staunford, J.:

"And in order to understand it *(licet)* truly, being a Latin word, we ought to follow the steps of our predecessors, Judges of the Law, who, when they were in doubt about the meaning of any Latin words, enquired how those who were skilled in the study thereof took them, and pursued their construction."

When experts were so summoned at this time, the information was in all probability furnished to the *court* rather than to the jury, whereupon the court would instruct the jury on the matters involved. Holdsworth says that "these witnesses were regarded as expert assistants to the court."[43] That skilled persons were summoned by the *court* seems all the more probable when we realize that these early juries were expected to decide issues from their own knowledge and that the practice of taking the testimony of witnesses was looked on askance until the 16th century.

Although there are prototypes of the modern expert witness during this time, there is no such thing as an *expert witness*. We can look for the *expert witness* only when the proof of facts by witnesses, rather than by the personal knowledge of the tribunal, becomes accepted, a change which took place during the 16th century.[44]

[38] THAYER, CASES ON EVIDENCE (2d ed., 1900), 673.
[39] *Supra* note 11. [40] At 673.
[41] This case is cited also in the opinion of Stamford, J., in Buckley v. Rice, *supra* note 11.
[42] *Supra* note 11.
[43] 9 HOLDSWORTH, *op. cit. supra* note 4, at 212. See, too, THAYER, *op. cit. supra* note 35, at 672; 4 WIGMORE, *op. cit. supra* note 2, §1917; Hand, *supra* note 10, at 40.
[44] 1 HOLDSWORTH, *op. cit. supra* note 4, at 334; 9 *id.* at 178.

It was then that legislation was enacted to provide for compelling witnesses to appear;[45] and it was then that proof by witness in open court, the modern method, became the ordinary accompaniment of jury trial. By the middle of the 17th century the office of juror has become clearly distinct from that of witness. So during this transitional period there are cases in which skilled persons have testified before court and jury. In 1619 we see that physicians testified, in an ejectment action, that a child born January 5, 1611, might be the daughter of a man who died March 23, 1610:

". . . and this being proved [misuse of the mother by the father in law after the husband's death and before the birth], and this misusage by five women of good credit, and two doctors of physic, viz. Sir William Baddy and Doctor Munford, and one Chamerlaine (who was a physician, and in nature of a midwife), upon their oath, they affirming that the child came in time convenient to be the daughter of the party who died; . . .

"The Court held here, that it might be well as the physicians had affirmed, . . . *and so the Court delivered to the jury, that the said Elizabeth, who was born forty weeks and more after the death of the said Edmund Andrews, might well be the daughter of the said Edmund.*"[46]

It is not clear from the report of the case who called these physicians; but we do see that the court apparently believed the proposition and so charged the jury. In 1665 in the notorious *Witches Trial*,[47] Sir Thomas Browne, the most distinguished physician of the time and author of *Religio Medici*, testified before the jury to his belief in witches, elaborating his opinion by a scientific explanation of the fits to which they were subject. Again it is not clear who summoned him, although he testified in open court. From the report we learn that

"There was also Dr. Brown of Norwich, a person of great knowledge, who after this evidence given [testimony of the fact witnesses], and upon view of the three persons in Court, was desired to give his opinion, what he did conceive of them, and he was clearly of opinion, that the persons were bewitched; . . ."

By 1678 we have cases where there are experts on both sides. In that year in *Rex v. Pembroke*,[48] a murder trial, both the prosecution and defense called physicians to testify to the causes of symptoms observed in an autopsy and to the proposition whether a person can die of wounds without fever. Similarly, in the next year in another murder trial, *Rex v. Green et al*,[49] two surgeons, who had viewed the body of the victim, were summoned by the prosecution in order to give their opinion as to the cause and manner of death and as to the length of time the victim had been dead when viewed. In 1682, again in a murder prosecution, *Rex v. Coningsmark*,[50] a surgeon was summoned by the crown to offer his opinion as to the nature of bullet wounds, the cause of death, and also the type of wound which certain bullets could produce. And in the celebrated trial of Spencer Cowper for the murder of Sarah

[45] Act of 1562-1563, 5 ELIZ. c. 9, §12.
[46] Alsop v. Bowtrell, Cr. Jac. 541 (1610). (Italics added.)
[47] Rex v. Cullender and Duny, 6 How. St. Tr. 687 (1665).
[48] 6 How. St. Tr. 1310 (1678).
[49] 7 How. St. Tr. 159 (1679).
[50] 9 How. St. Tr. 1 (1682).

Stout in 1699[51] there was much medical testimony produced by the prosecution and defense concerning the cause of death. However, it would seem that at least in mercantile matters, the court continued for some time to summon skilled persons to aid it. In *Buller v. Crips*,[52] in which an indorsee-plaintiff had framed his declaration in an action against the maker of the note "upon the custom of merchants as upon a bill of exchange," Chief Justice Holt on his own initiative sought out two merchants for their opinion as to the negotiability of the paper in question:

"At another day Holt, Chief Justice, declared that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course; *and they had told him, it was very frequent with them to make such notes, and that they looked upon them as bills of exchange*, and that they had been used for a matter of thirty years, and that not only notes, but bonds for money, were transferred frequently, and indorsed as bills of exchange." (Italics added.)

By the 18th century the party system of experts had become firmly settled.[53] In 1782 the leading case of *Folkes v. Chadd*[54] was decided by Lord Mansfield. This case, an action of trespass before a jury, established the sphere in which expert testimony would be admissible. The issue involved was the cause of a harbor filling up. The plaintiff produced a well known engineer, Mr. Smeaton, whose opinion as to the cause of the injury was requested. This evidence was objected to on the ground that it was a matter of opinion, which could not be the foundation for the verdict of a jury because the verdict should be based entirely on facts. On appeal, Lord Mansfield held the evidence permissible, saying:

"The question is, to what has this decay been owing? The defendant says to this bank, Why? Because it prevents the backwater. That is a matter of opinion; the whole question is a matter of opinion, from facts agreed upon. . . . On the first trial, the evidence of Mr. Milne, who has constructed harbors, and observed the effect of different causes operating upon them, was received; and it never entered into the head of any man at the bar that it was improper. . . . On the motion for the new trial, the receiving Mr. Milne's evidence was not objected to as improper; but it was moved for on the ground of that evidence being a surprise; and the ground was material, *for in matters of science the reasonings of men of science can only be answered by men of science. The court, considering the evidence as proper, directed the opinions to be printed, and to be exchanged.* Under the persuasion of this being right, the parties go down to trial again, and Mr. Smeaton is called. A confusion now arises from a misapplication of terms. It is objected that Mr. Smeaton is going to speak, not as to facts, but as to opinion. That opinion is deduced from facts which are not disputed—the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all these facts, is, that mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbors, the causes of their destruction, and how remedied. *In matters of science no other witnesses can be called. . . . I cannot believe*

[51] 13 How. St. Tr. 1106 (1699). [52] 6 Mod. 30 (1705).

[53] 9 HOLDSWORTH, *op. cit. supra* note 4, at 212; 4 WIGMORE, *op. cit. supra* note 2, §1917 ("But by the latter part of the 1700's he took his place with others as a mere witness to the jury").

[54] 3 Doug. 157 (1782).

that where the question is, whether a defect arises from a natural or artificial cause, the opinions of men of science are not to be received. . . . The cause of the decay of the harbor is also a matter of science. . . . Of this, such men as Mr. Smeaton alone can judge. Therefore we are of opinion that his judgment, formed on the facts, was very proper evidence." (Italics added.)

We see that by the time Lord Mansfield wrote, the necessity for skilled assistance was clearly recognized, and the ordinary method was production of expert witnesses by the parties. It appears, then, that there have been three methods of employing skilled knowledge for the decision of issues: special juries, experts called to aid the court, and party experts. This last is comparatively modern, but is the one best known to us.

THE OPINION RULE

With the development of jury trial and of proof by witnesses—that is, an appreciation of a distinction between juror and witness—there begins to take shape the law of evidence. This change, we have noted, begins in the sixteenth century. To the influence of jury trial may be attributed the most characteristic element of the law of evidence, the exclusionary rules,[55] which determine the competency of witnesses and the admissibility of evidence. Their original purposes were to guard the jury from being misled by the testimony produced and to keep the considerations of the jury within the issues of the pleadings. These rules, however, developed slowly; Holdsworth observes that "in the first half of the seventeenth century, we get the phenomenon noted by Hudson (*Star Chamber*, p. 210) that 'the books of common law do yield small direction for examination of witnesses; and the civilians are therein far too copious.' "[56] And Wigmore says that up to the 1700's there was no definite idea that opinion testimony or the like was proper or improper and that the thought on the subject was negligible.[57]

Among the foremost of the exclusionary rules is the so-called "opinion" rule. The substance of it, as applied today, is that a witness testifying to his experience in regard to the matters in issue should testify to the "facts" observed and not to his own opinion or inference therefrom. After such testimony is produced, the trier of fact is deemed capable of making the inferences or framing the opinion.[58] Only when the witness has some special skill or experience which would aid the tribunal in arriving at its conclusions from the operative facts is a witness permitted to express an opinion. Wigmore's contention that the true theory of the rule is thereby to eliminate superfluous testimony seems to be more convincing than the other two reasons commonly offered as the basis for excluding opinion—that to permit the witness to give his opinion would be to permit him to usurp the functions of the jury and that it concerns the very issue before the jury, both of which reasons seem

[55] 9 HOLDSWORTH, *op. cit. supra* note 4, at 127. See also, THAYER, *op. cit. supra* note 1, Introduction.
[56] 9 HOLDSWORTH, *op. cit. supra* note 4, at 180.
[57] 4 WIGMORE, *op. cit. supra* note 2, §1917.
[58] 4 WIGMORE, *op. cit. supra* note 2, §1918.

to be very similar.[59] Yet a jealous regard for the province of the jury seems to have been influential in shaping the strictness of the law in regard to opinion evidence. So long, however, as the jury is responsible for the ultimate determination of facts, the usurpation argument seems lacking in substance. Lord Mansfield apparently had in mind the same idea as Wigmore has put forth, when although noting the irrelevancy of opinion evidence by an insurance broker in regard to the materiality of representations and concealments, he sustained the verdict of the jury in *Carter v. Boehm*:[60]

"Great stress was laid upon the opinion of the broker. *But we think the jury ought not to pay the least regard to it.* It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. *It is opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause;* and therefore it is *improper* and *irrelevant in the mouth of a witness.*"

So the opinion rule today is one of exclusion, designed to limit the witness to the presentation of those matters upon which the jury is qualified to pass judgment. This exclusionary rule has one great exception; it does not apply to expert witnesses. And it provides the principal legal distinction between the ordinary and the expert witness in our law. Some instances of this exclusionary principle in operation are opinions as to: the amount of damage to cattle by feeding them inferior hay;[61] whether a person's conduct was careful or careless;[62] ability of a person in a certain location and at a certain distance to overhear a conversation;[63] whether two people were attached to each other and whether their conduct towards each was affectionate;[64] the amount of profits claimed to be lost (a schedule prepared by the plaintiff had been admitted in evidence; "in effect, he stated his opinion as to the loss of profits resulting . . ."); [65] whether the origin of a fire was incendiary or not,[66] the length of time a fire had been burning,[67] whether an ordinarily competent signature clerk would be put on suspicion by slight change in spelling of a name,[68] whether certain transactions and conversations amounted to an agreement,[69] the amount of force necessary to remove a passenger.[70]

The original foundation of this rule, to use Wigmore's terminology, is in the requirement of "Testimonial Knowledge," that is, that the witness know from a factual basis whereof he speaks and not merely hazard a guess.[71] "Opinion" orig-

[59] 4 WIGMORE, *op. cit. supra* note 2, §§1918, 1920-1921.
[60] 3 Burr. 1906 (1766). (Italics added.)
[61] Morehouse v. Matthews, 2 N. Y. 514 (1849).
[62] McCarragher v. Rogers, 120 N. Y. 526, 24 N. E. 812 (1890).
[63] McLaughlin v. Webster, 141 N. Y. 76, 35 N. E. 1081 (1894).
[64] Pearce v. Stace, 207 N. Y. 506, 101 N. E. 434 (1913).
[65] Moran v. Standard Oil Co., 211 N. Y. 187, 105 N. E. 217 (1914).
[66] People v. Grutz, 212 N. Y. 72, 105 N. E. 843 (1914).
[67] Goodman v. Ins. Co., 222 N. Y. 121, 118 N. E. 523 (1917).
[68] Noah v. Savings Bank, 225 N. Y. 284, 122 N. E. 235 (1919).
[69] Hillock v. Grape, 111 App. Div. (N. Y.) 720, 724, 97 N. Y. Supp. 823 (1906).
[70] Regner v. R. R., 74 Hun 202, 26 N. Y. Supp. 625 (1893).
[71] 4 WIGMORE, *op. cit. supra* note 2, §1917.

inally was synonymous with guesswork. What the tribunal was interested in was matter which had fallen within the personal observations of the witness—an experience of the witness which was sufficiently definite to rely upon. That such was the early idea of "opinion" may be gathered from the statement in *Adams v. Canon*[72] in 1622, for which Lord Coke is cited as authority:

". . . it is not satisfactory for the witness to say, that he thinks or persuadeth himself; and that for two reasons by Coke: 1st, Because that the Judge is to give an absolute sentence, and therefore ought to have more sure ground than thinking; 2dly, The witness cannot be prosecuted for perjury; . . ."

Even under the older mechanical system of determining litigation, this requirement of personal observation attached in the few instances where witnesses, preappointed at the time of certain transactions for the purpose of proof, were allowed to come forth in court; what they testified to had to be *"de visu et auditu."*[73] When the institution of witnesses became an accepted part of trial procedure, this testimonial requirement attached and continued.[74]

The importance of this requirement was emphasized when those with specialized experience were brought into the trial of issues as witnesses to the jury. Previously the need of this kind of knowledge had been supplied by specialized juries or by the court summoning experts, and therefore no question arose as to the source of the expert's information. But when the expert became a witness, his testimony differed materially from that of the ordinary witness, for the primary purpose of his testimony was to put forth the opinion or inferences of a skilled person on the matter in issue. To justify this kind of testimony was indeed a question, for the necessity of such information existed then as much as it ever had; yet on the other hand was the idea that mere opinion was not evidence. Finally, as has been seen, Lord Mansfield, in *Folkes v. Chadd*,[75] decided the matter, and expert testimony by "men of science" in the form of opinion evidence as to a "matter of science" was proper testimony to bring before a tribunal. During the 18th century then, we have a rule developed that opinion evidence, opinion without a fact-knowledge basis, is not proper evidence; but this rule does not apply to the testimony of men of science who are not acquainted first-hand with the matter.

From this foundation of the rule, Wigmore traces the shift to the modern theory, *viz.*, the exclusion of superfluous testimony.[76] The testimony of an expert was considered an exception to the requirement that the witness speak from factual experience, because the opinion of the expert was helpful to the jury. However, if the jury was capable of drawing inferences from the factual testimony presented, the opinion of a witness thereon would not provide any help and, therefore, would be superfluous. Thus, the ordinary witness is silenced when he would state his

[72] 1 Dyer 53b, note a (1622).
[73] 9 HOLDSWORTH, *op. cit. supra* note 4, pp. 211-212.
[74] 1 WIGMORE, *op. cit. supra* note 2, §657, 4 *id.* §1917.
[75] *Supra* note 51. [76] 4 WIGMORE, *op. cit. supra* note 2, §1917.

opinion or inference. Opinion testimony is no longer excluded because of lack of "Testimonial Qualifications," but rather as a rule of "Auxiliary Policy."[77]

THE HYPOTHETICAL QUESTION

The development of expert testimony and of the modern opinion rule has given rise to another distinctive feature of the law of evidence, the requirement of the hypothetical question in obtaining the opinion of an expert who has not personally observed the "facts" to which his opinion is related. The substance of this requirement is that when an expert witness lacks personal observation, the examiner in his question must set forth merely as an assumption or hypothesis the detailed items of evidence which are to form the basis of the opinion.[78] Thus a means is provided for the jury (or judge where he is the trier of fact) to determine the value of the opinion by testing its premises—which often include evidence disputed by the opposing party—with the facts as ultimately found by the jury after all the evidence has been produced. Only if the data as assumed by the questions coincide with the determination of facts made by the jury is the opinion of the expert pertinent. If the jury does not accept the assumed version, the foundation of the opinion drops out and accordingly the opinion must be discarded. Of course, if the expert has had personal observation, he already has the basis for an opinion which he may state directly, since he is as available as an ordinary "fact" witness for examination as to the items upon which opinion rests.[79]

A fairly well-defined body of law has developed about the use of the hypothetical question. In the question may be included any or all of the matters which the adduced evidence tends to support. So long as the detailed data comprise facts likely to be considered by the tribunal, the examiner, is not restricted in the content of the question, and he may frame it according to any theory which there is evidence to support.[80] In this way opinion evidence which is useless and irrelevant because unrelated to the fact evidence is curtailed. Usually the question must also specify what the assumed facts are so that the jury may readily analyze the reasons for the opinion.[81] Accordingly, certain types of questions are improper. For instance, the following forms may not usually be employed: "Upon all the testimony in the case, what is your opinion?" "Upon the testimony which you have heard in the case, what is your opinion?" And questions such as "Assuming the truth of the testimony for the plaintiff or the defendant," or, "Assuming the truth of the testimony of certain witnesses, what is your opinion?" generally are objectionable. The foregoing limitations have now crystallized into rather strict rules; and we may see reversals in the highest courts because of a failure to follow this method of examination.[82]

[77] 4 WIGMORE, *op. cit. supra* note 2, §1918.
[78] *Id.* §675.
[79] 1 WIGMORE, *op. cit. supra* note 2, §676.
[80] *Id.* §682.
[81] *Id.* §681. This section contains an excellent discussion of proper and improper methods of "particularization of premises to be used."
[82] Wiebert v. Hannan, 202 N. Y. 328, 85 N. E. 688 (1911); Marx v. Ontario Beach Co., 211 N. Y. 33, 105 N. E. 97 (1914).

Yet in the earliest cases dealing with expert testimony, there seems no vestige of these rules. Thus, in the *Witches Trial*,[83] for instance, the report tells us that Dr. Browne, after the testimony of the "fact" witnesses and upon view of the persons in court, was asked to give his opinion. Yet there is no detailing of facts previously testified to or anything in the nature of a hypothetical question; just the learned doctor's own opinion.

It is during the 1700's, when the problem presented by considering "opinion" as distinguished from "fact" or personal observation emerges, that we first see reference to the requirement of detailing the matter upon which an opinion is desired.[84] And the references from then on would seem to indicate that such a method was intended primarily to aid the tribunal. In the trial of Earl Ferrers[85] in 1760, for murder, the defendant, examining a doctor on the matter of insanity, put the following question:

"Please to inform their lordships whether any, and which of the circumstances which have been proved by the witnesses are symptoms of lunacy."

This was objected to by the Attorney-General, to which objection the Earl of Hardwicke, Ferrers' counsel, agreed:

"My lords, this question is too general, tending to ask the doctor's opinion upon the result of the evidence, and is very rightly objected to by the counsel for the crown; if the noble lord at the bar will divide the question, and ask whether this or that particular fact is a symptom of lunacy, I dare say they will not object to it."

Whereupon the defendant specified certain acts and asked the doctor "please to inform their lordships" whether such acts indicated lunacy. It will be seen that the objection could best be met by the examiner setting forth the facts, the essence of the hypothetical method.

The next case of interest relating to this method of examination is the trial of Lord Melville[86] in 1806 for misappropriation of public funds. The prosecution, after showing how certain sums were misapplied, proposed to show the gain derived from their use. An accountant was called to prove this by his calculations. This was objected to as an improper subject for evidence, being merely assumed matter and opinion, which the tribunal might well draw for itself. The calculations were allowed in evidence. The discussion of the Lords on this point show that they considered the proposed matter in the nature of a hypothetical question, which would justify its admission:

A Lord: ". . . *the data and facts stand as they did, it is a mere hypothetical question to the witness.* If the facts stand so and so, what is the arithmetical result?"

Ld. Chanc.: ". . . it proceeds on certain data. *If you take away the foundation upon which it is made, which is matter for the court afterward, there is an end of the superstructure.*"

[83] *Supra* note 47.

[84] In all the cases discussed above, which arose in the seventeenth century, the expert witnesses had had personal observation of the subject matter.

[85] 19 How. St. Tr. 886 (1760).

[86] 29 How. St. Tr. 606 (1806).

Another Lord: "All the inconvenience that might result from this entry, would be obviated by stating, that if it is proved, or shall be proved, that such and such facts exist, that is the calculation of the profits; *but that will not be an admission of the facts.*" (Italics added.)

When it was shown that the validity of the calculations depended upon the existence of specific facts, there was no hesitancy in accepting the evidence, for the tribunal was then in a position to apply the calculations to its determination of the litigated transaction.

Beckwith v. Sydebotham,[87] the following year, shows that the hypothetical question was by then the accepted method to elicit expert opinion where the facts were disputed. Lord Ellenborough held admissible the opinion of ship surveyors, formed on the basis of certain testimony, as to the seaworthiness of a ship, and he concluded:

"As the truth of the facts stated to them was not certainly known, their opinion might not go for much; but still it was admissible evidence. The prejudice alluded to [admitting an opinion upon a statement that might be false] might be removed by asking them in cross-examination, what they should think upon the statement of facts contended for on the other side."

This method is proper because the trier of fact is thereby enabled to determine, in its deliberations, whether or not the opinion might "go for much."

Perhaps the best known judicial expression on the examination of an expert witness, who lacks personal observation, is contained in the discussion of the judges in *M'Naghten's Case*[88] in 1843. The fifth question put was:

"Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusions at the time?"

Mr. Justice Maule's opinion was:

"In principle, it is open to this objection, that, as the opinion of the witness is founded on those conclusions of facts which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to."

The first sentence in the passage quoted points to the vice in an opinion given by an expert which is not in response to a question setting forth the factual premises. The formulation of an opinion under such circumstances involves a selection by the expert from amongst disputed facts, without making evident to the body ultimately responsible for determining the truth of the matter what the facts selected are. Consequently the jury cannot tell whether the opinion is based on the same facts which it finds to be true.

[87] 1 Camp. 116 (1807). [88] 10 Cl. & F. 207 (1843).

The second sentence indicates that the precaution, noted as early as the trial of Earl Ferrers in 1760, of having the factual bases of the expert's opinion detailed, had not been consistently followed in subsequent cases. But the other justices were not content to follow Mr. Justice Maule in his acquiescence in this practice. Lord Chief Justice Tindal, speaking for them, doubted the validity of the questions in the terms put

"because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible."

This ruling afforded a firm basis in precedent for the requirement of the detailed hypothetical question in the examination of expert witnesses where, at least, the facts are in dispute. Where the facts are admitted or undisputed, the Lord Chief Justice conceded that the more general form of question might be employed, but only as a matter of convenience and not of right.

That in the United States the requirement of the hypothetical question was taking form about the same time as in England is made evident by a charge to the jury in a murder trial in a federal court as early as 1851.[89] Referring to the testimony of physicians relative to the defense that the defendant was afflicted with delirium tremens, Mr. Justice Curtis, who in the same year became a member of the United States Supreme Court, pointed to the reason for use of the hypothetical method in the following statement:

"They were not, as you observed, allowed to give their opinions upon the case; *because the case, in point of fact, on which anyone might give his opinion, might not be the case which you, upon the evidence, would find; and there would be no certain means of knowing whether it was so or not.* It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known or hypothetical state of facts; and, therefore, the counsel on each side have put to the physicians such states of facts as they deem warranted by the evidence, and have taken their opinions thereon." (Italics added.)

The emphasis in these early opinions on the respective functions of expert and jury doubtless gave impetus to an explanation of requiring the use of the hypothetical question which is frequently met with in subsequent cases and which we have already encountered in connection with the opinion rule. The question is said to be necessary *to prevent the expert from usurping the province of the jury.*

It is true that an expert required to render an opinion on the basis of evidence which is in dispute would, as has been seen, be obliged, if a hypothetical question were not put to him, to select as a basis for his opinion those facts which he believed to be true, a necessity which the jury also faces. But even if the expert were permitted to do this, the jury's obligation to determine the facts would remain unchanged. However, not only would their function be duplicated by the expert, but

[89] 1 Curt. 1, Fed. Cas. No. 15, 679 (C. C. D. Mass. 1851).

the value of his opinion to the jury in the discharge of its duty would be greatly diminished. It is in its design to assure the clear, orderly, and helpful presentation of expert opinion evidence to the jury that the true explanation of the hypothetical question requirement is to be found.

An excellent illustration of a court's consideration of the usurpation and of the proper theory is found in the opinion of the New York Court of Appeals in *People v. McElvaine*.[90] The propriety of the following question, put to a physician who had attended the trial on the issue of the defendant's sanity, was before the court:

"Based upon the whole testimony of the prosecution and the defense . . . and everything that you have heard sworn to here, now will you answer the question?"[91]

Chief Judge Ruger, writing for the court, could not "doubt but that this question was improper":

"The witness was thus permitted to take into consideration all the evidence in the case . . . determine the credibility of witnesses, the probability or improbability of their statements. . . . It cannot be questioned but that the witness was by the question put in the place of the jury, and was allowed to determine upon his own judgment what their verdict ought to be. . . ."

But though this may be the result of such a question, the reason why it is not competent is that

"it would then be impossible for the jury to determine the facts upon which the witness bases his opinion, and whether such facts were proved or not. Suppose the jury conclude that certain facts are not proved, how are they in such an event to determine whether the opinion is not, to a great degree, based upon such facts? When specific facts, either proved or assumed to have been proved, are embraced in the question, the jury are enabled to determine whether the answer to such question is based upon facts which have been proved in the case or not, and whether other facts bearing upon the correctness and force of the answer are contained therein, or have been omitted from it; *but in the absence of such a question, the evidence must always be, to a certain extent, uncertain, unintelligible, and, perhaps, misleading*. . . ." (Italics added.)

Viewed in the light of this explanation, the requirement that the hypothetical question be employed in eliciting expert opinion, is revealed as but a logical step in the development of the use of expert testimony in the common law procedure for the trial of causes. Indeed, it merits Wigmore's characterization as "one of the few truly scientific features of the rules of Evidence."[92] But it is significant to note that Wigmore also asserts that "The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth."[93]

[90] 121 N. Y. 250, 24 N. E. 465 (1890).

[91] It is interesting to note the similarity between this question and the fifth question put to the judges in McNaughten's Case, *supra* note 88.

[92] 1 WIGMORE, *op. cit. supra* note 2, §686.

[93] *Ibid.* Dean Wigmore proposes that the hypothetical question be abolished as a requirement and that its use, except on cross-examination, be left to the discretion of the court.

AN ALTERNATIVE TO THE BATTLE OF EXPERTS: HOSPITAL EXAMINATION OF CRIMINAL DEFENDANTS BEFORE TRIAL

HENRY WEIHOFEN*

It is fairly clear that improvement in the criminal law governing insanity as a defense must come—and indeed is coming—not through revision of the substantive law on the subject, but through improvement in the *procedure* for handling these cases.

It is true that most of the debate on the subject has centered around the substantive law governing the "tests" of criminal responsibility: what sort and degree of mental disorder must a person have to excuse him from criminal liability for his act? The sad fact is, however, that all that has been said and written on that subject during the past hundred years has resulted in just exactly nothing so far as affecting any change in the law is concerned. The tests of insanity have not been changed in the slightest; even *M'Naghten's Case*,[1] usually looked upon as the leading case on the subject, added nothing to the law as it stood before that famous opinion was delivered in 1843. As the writer has pointed out elsewhere,[2] there has not even been any tendency toward a change, and the possibility of any reform in this direction in the near future seems slight.

This lack of any development in the substantive law of criminal responsibility has been the subject of so much deploring and caustic comment that we have rather lost sight of the very real advances that have been made by means of procedural changes. It is the purpose of this paper to discuss one of the most helpful of the modern procedural devices which have been found for improving the handling of these cases—that embodied in statutes providing for a psychiatric examination of the defendant before the criminal trial.

OUR INEXPERT USE OF EXPERTS

If our jury system does require that the question of the defendant's mental responsibility be diagnosed by a jury whose only qualification for that complex

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[1] 10 Clark & Fin. 200 (1843).

[2] WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933) 64-68.

scientific task is that they are good men and true, we ought at least to give them a little more assistance in that duty than we now give. It is true that to aid the jury we permit expert testimony on the issue to be introduced. However, the method of presenting this expert testimony in most states is open to serious criticism. To mention only the defects most commonly pointed out:

1. Any reputable practicing physician is legally qualified to speak as an expert on insanity, even though he may never have had any instruction or experience in mental disease. As a result, it is usually possible to hunt up some quacks or eccentric "experts" whose fantastic theories will permit them to testify as counsel wishes, even though no reputable pychiatrist would agree with them. The jury is usually unable to distinguish the competent expert from the incompetent, and obviously has no means of knowing how many experts refused to testify as counsel wished, before acceptable experts were found. The law relies upon cross-examination to reveal the witness' incompetency or inaccuracy, but as a matter of fact it is often the witness whose judgment is unobscured by too much knowledge of the subject who will be most positive in his assertions and who will make the best impression on the jury. Furthermore, leaving the witness' qualifications to be brought out on cross-examination too often leads to the sort of badgering and bickering for which these cases have become notorious.

2. The partisan nature of the expert's services makes it difficult to obtain reliable and unbiased evidence. Allowing experts in criminal trials to be called on behalf of the parties is peculiar to the common law.[3] It lies at the root of one of the great evils of which such trials are productive—lack of that impartiality which should be characteristic of scientific inquiry.

3. The opinion testified to is often not based upon sufficient scientific observation and examination. At best, an examination made while the subject is in prison is not very satisfactory, and often no really thorough physical, mental, and neurological examination or study of the case history is even attempted, the witness' opinion being based merely upon what the defendant chooses to tell about himself or what his family tells about him. Worse yet, an expert who has not examined or even seen the defendant at all is competent to testify in answer to hypothetical questions.[4] Such questions may include only such facts, proved or hoped to be proved, as tend to support the questioner's side of the case.[5] Moreover, the witness may not himself believe in the truth of the facts assumed.[6] The unfairness and unsoundness of the use of hypothetical questions in these cases has been pointed out by alienists repeatedly.[7]

[3] For a discussion of the rôle of the expert in continental criminal procedure, see Ploscowe, *The Expert Witness in Criminal Cases in France, Germany, and Italy, infra*, p. 504.

[4] Parrish v. State, 139 Ala. 16, 36 So. 1012 (1903).

[5] People v. Truck, 170 N. Y. 203, 63 N. E. 281 (1902), and cases cited in WEIHOFEN, *op. cit. supra* note 2, at 208.

[6] Ryan v. People, 50 Colo. 99, 114 Pac. 306 (1911).

[7] Dr. L. Vernon Briggs has condemned the hypothetical question as misleading, unfair, an excrescence

THE SOLUTION: COMMITMENT TO THE STATE HOSPITAL FOR EXAMINATION

The solution which a growing number of states have found for this situation is a comparatively simple one. They have enacted statutes which provide that whenever the defendant's sanity or mental condition becomes an issue in a criminal case, the court shall commit the defendant to a state mental institution for observation and examination. Usually the period of such commitment is limited to thirty days. At the end of that time, the superintendent of the hospital reports his findings, and may testify as an impartial witness in the case.

There is certainly nothing revolutionary in such a provision. It can't even be called new, for the state of Maine has had a statute of this sort for almost ninety years. There is only one reason for calling attention to these statutes, and that is the remarkable degree of success they have had in eliminating the objectionable features attaching to insanity trials in most of the states. They have practically rendered extinct the disgraceful "battles of the experts" which still characterize insanity cases elsewhere, and have substituted an impartial, scientific diagnosis of the defendant's mental condition for the theatrical spectacle of a court trial.

The Maine statute refers only to the issue of insanity as a defense, *i.e.*, was the accused, at the time of the offense charged, so mentally disordered as to be criminally irresponsible.[8] Five states, Maryland, Massachusetts, New Hampshire, New York, and Wisconsin, have statutes providing for commitment to a state hospital for observation to determine the question of the defendant's mental capacity to stand trial, *i.e.*, whether he is rational enough to understand the nature of the proceedings and to aid in his own defense.[9] In three states, Colorado, Ohio, and Vermont, the statutes cover both situations, and provide that whenever the question of insanity arises, either as a defense or as a reason for the defendant's not being presently tried, the court may commit him to a state hospital for observation.[10]

In theory, these two issues are entirely different. The first involves the question of the defendant's guilt or innocence: was he, at the time of the act charged, so mentally disordered as not to know that it was wrongful, or, in some seventeen states, if he did know that the act was wrongful, was he mentally incapable of resisting the impulse to commit it? If so, he is not responsible for his act, and should be

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and a disgrace to the law, and a travesty on justice. Briggs, *Medico-Legal Insanity and the Hypothetical Question* (1923) 14 J. CRIM. L. & CRIMIN. 62, 72. Dr. Wm. A. White, one of the most eminent psychiatrists in the country, has said that "in a large experience I have never known a hypothetical question, in a trial involving the mental condition of the defendant, which in my opinion offered a fair presentation of the case." WHITE, INSANITY AND THE CRIMINAL LAW (1923) 56. The American Psychiatric Association and the New York Psychiatric Society have urged the abolition of the hypothetical question. Briggs, *supra*, at 74; Menninger, *Medicolegal Proposals of the American Psychiatric Association* (1929) 19 J. CRIM. L. & CRIM. 367, 376.

[8] ME. REV. STAT. (1930) c. 149, §1; Me. Pub. Laws 1933, c. 1, §416.

[9] MD. ANN. CODE (Bagby, 1924) art. 59, §§8, 10 (examination made by Board of Mental Hygiene); MASS. ANN. LAWS (Michie, 1933) c. 123, §100; N. H. PUB. LAWS (1926) c. 11, §13; N. Y. CODE CRIM. PROC. §836, as amended, N. Y. Laws 1933, c. 564; WIS. STAT. (1933) §357.12 (3).

[10] Colo. Laws 1927, c. 90, §2; OHIO ANN. CODE (Page, 1932) §13441-4; VT. GEN. LAWS (1917) §§2602, 2620.

found not guilty by reason of insanity. The other does not go to the question of guilt or innocence at all, but only to the defendant's present mental condition, under the principle that the law will not try or execute a person while he is too insane to understand what is happening to him, or to state rationally whatever he may have to say in his own defense.

In application, however, this distinction becomes less clear, because a person suffering from a serious psychosis will often be found to be too disordered to meet either test, whether of responsibility for his act, or present ability to stand trial. Nevertheless, it is true that they cover fundamentally different aspects of the case, and we shall examine particularly the statutes permitting hospital observation for the purpose of determining the question of criminal responsibility at the time of the act charged, since that involves the ultimate question of guilt or innocence.

EXPERIENCE UNDER THE COLORADO STATUTE

The Colorado law is typical of all four of the state statutes permitting commitment for this purpose, and provides a good subject for study, because it has been very frequently resorted to since its enactment in 1927, and there are complete statistics available.

In form, the Colorado law is simple. The provision we are interested in is embodied in one sentence, which reads:

"Upon the making of any such plea of insanity, the judge shall forthwith commit the defendant to the Colorado Psychopathic Hospital at Denver or to the State Hospital at Pueblo where the defendant shall remain under observation for such time as the court may direct, not exceeding one month."[11]

On arriving at the hospital, the patient is assigned to particular staff physicians for examination. The case is then presented at staff meeting, and the whole staff passes on the mental condition of the patient. Frequently, the patient appears before the staff meetings several different times, so that an accurate estimate of his condition can be obtained. When the staff has studied the patient sufficiently to make a diagnosis, the superintendent makes his report to the court. When the case is tried, the superintendent is usually subpoenaed to testify to his finding. In some cases, other members of the staff are also subpoenaed.

The remarkable fact is that in the comparatively few years that the law has been on the books, its soundness has so demonstrated itself that today lawyers for the defense rarely if ever contest the finding of the hospital. If, on the plea of insanity and after commitment, the hospital reports that the man is sane and responsible, counsel almost invariably accept that finding, and drop the insanity defense. This means that the only evidence on that issue is that of the hospital staff members. There is no battle of experts to make a farce of the judicial process and to confuse the jury. As a result, the jury, with rare and understandable exceptions, renders a verdict in accordance with the hospital's findings.

[11] Colo. Laws 1927, c. 90, §2.

The superintendents of the Colorado state hospitals have adopted the practice, in their reports to the courts, of making not merely a formal finding of "sane" or "insane," but also recommendations as to the proper disposition of the defendant. Among their recommendations, the hospitals have not hesitated to include such suggestions as "institutionalization" and "psychiatric supervision" for cases requiring individualization, even though stating in the report that it was realized there were no facilities in the state for carrying out these recommendations. In this way, the hospitals have been able to do much to educate judges, prosecutors, and lawyers in the need for specialized treatment for certain types of disordered offenders.

The operation of the law can perhaps best be appreciated after consulting the records. During the eight years the law has been in effect, from Aug. 1, 1927 to July 30, 1935, there have been 211 commitments for observation to the Psychopathic Hospital, and 42 to the State Hospital. Of this total of 253, 153, or more than 60 per cent, were found sane; 97, or slightly less than 39 per cent, were found insane; one recovered while in the hospital and one was still in the hospital undiagnosed. But these are merely rough totals. A more complete analysis of the cases committed to the Psychopathic Hospital is given below:

COLORADO PSYCHOPATHIC HOSPITAL

Cases Admitted Under 1927 Law from August 27, 1927 to July 30, 1935

Total 1927 Law Cases	211
Formal Opinion as returned to the Court:	
*Sane	129
Insane	74
†Mentally defective	7
Still in hospital, opinion not given	1
Recommendations of the Hospital as to Future Care:	
Due process of law	101
Commitment as insane	75
Suspended sentence with psychiatric follow-up	15
‡Institutionalization	17
Commitment to training school for mental defectives	2
Still in hospital, no recommendations made	1
Action of the Court:	
Imprisoned	92
Committed as insane	67
Reformatory	11
Charges dismissed and defendant released	9
On probation	8

*This figure includes those cases of mental deficiency where the patient was considered to be responsible for his acts.

†In these cases the mental defect was so great that the patient was not considered responsible for his acts and institutionalization was recommended, although the mental deficiency was not accompanied by a psychosis.

‡Recommended in cases not legally insane, with the period of confinement dependent upon the individual rather than the crime committed.

Disposition unknown to the hospital as yet	7
Death sentence	5
Suspended sentence	3
Acquitted	3
Committed to State Home for Mental Defectives	1
Fined	1
State Industrial School following violation of parole	1
Reformatory following violation of parole	1
Penitentiary following violation of parole	1
Still in hospital	1

During the same period, some 42 more patients were committed to the State Hospital at Pueblo. Because this number is comparatively small, and because no similar statistics have been published regarding the operation of these laws in any state, it may be useful to list the history of each of these cases. The results obtained are typical. Indeed, if anything, they rather understate the efficiency of the law, because, as can be seen below, in five cases out of 42, the jury refused to follow the recommendation of the hospital. This is a much higher percentage of error (in so far as we can assume that the hospital is always right in its diagnosis and the jury, if it disagrees, wrong) than found in any other state having a similar provision, or at the Psychopathic Hospital at Denver, under the same law. Yet reference to the peculiar facts of these five cases shows that there were, in every one of them, other considerations which influenced the jury.

COLORADO STATE HOSPITAL

Cases Admitted under 1927 Law from August 1, 1927, to July 30, 1935

Name	Age	Offense	Diagnosis	Recommendation to the Court	Examiner asked to testify	Action of the Court
[1]Juan Garcia	23	Rape	Psychosis with mental deficiency	Commitment	Yes	Guilty
Chas. B. Ogden	50	Failure to support minor children	Paranoia or paranoid condition	Commitment	No	Committed
Geo. G. Morrison	43	Murder	Without psychosis; Mental deficiency	Not insane	Yes	Guilty
C. I. Graves	27	Murder	Not insane	Not insane	Yes	Guilty
Tony R. Wilson	25	Forgery	Not insane	Not insane	Yes	Guilty
Blaine Evans	36	Assault with intent to rape	Not insane	Not insane	No	Guilty
[2]Geo. K. Brown	62	Passing worthless checks	Manic depressive psychosis; Manic type	Not insane; Recovered from psychosis	No	Case dismissed
J. A. S. Backs	48	Rape	Traumatic psychosis	Commitment	Yes	Committed
Sam Stockton	35	Burglary; Grand Larceny; Receiving Stolen Goods	Not insane	Not insane	No	Guilty
Alberto Sanchez	24	Murder	Not insane	Not insane	Yes	Guilty
Nick Kassaras	63	Murder	Not insane	Not insane	Yes	Guilty
Wm. Fields	42	Assault with intent to kill	Paranoia or paranoid conditions	Commitment	Yes	Committed

[1]Offense was against an infant; therefore the community was very bitter against the defendant and the plea of insanity was disregarded.

[2]Patient recovered before period of observation was completed.

COLORADO STATE HOSPITAL—(CONTINUED)

Name	Age	Offense	Diagnosis	Recommendation to the Court	Examiner asked to testify	Action of the Court
Cal Thompson....	65	Murder	Dementia praecox; Paranoid type	Commitment	Yes	Committed
[1]Mary Trongo ...	44	Murder	Without psychosis; Mental deficiency	Not insane	Yes	Found insane
Christina Volgin..	38	Murder	Dementia praecox; Paranoid type	Commitment	Yes	Committed
Vance Shriver....	49	Murder	Not insane	Not insane	No	Guilty
[2]James Foster....	49	Murder	Dementia praecox; Paranoid type	Commitment	Yes	Not insane
John Hrinek.....	45	Murder	Dementia praecox; Paranoid type	Commitment	Yes	Committed
[3]Joe Vonderheid..	56	Burglary	Without psychosis; Mental deficiency; Moron	Supervision by responsible parties	No	Paroled
Mrs. Nina Palmer.	49	Forgery	Not insane	Not insane	No	*
Tom Bell.....	47	Larceny as bailee	General paralysis	Commitment	No	Committed
Rudolph Bessetto.	22	Murder	Not insane	Not insane	No	Guilty
John F. Taylor...	25	Murder	Not insane	Not insane	No	*
Abel Sanchez.....	47	Murder	Not insane	Not insane	No	*
Walter Jones.....	23	Murder	Not insane	Not insane	No	Guilty
Monred J. Nelson.	26	Murder	Not insane	Not insane	No	Guilty
Harvey Lee.....	26	Larceny	Dementia praecox; Paranoid type	Commitment	Yes	Committed
Hazel Howe Spicer	41	Murder	Dementia praecox	Commitment	Yes	Committed
John J. Ross.....	37	Robbery	Not insane	Not insane	No	Guilty
[4]Lester Gonce....	51	Murder	Not insane	Not insane	Yes	Found insane by the jury
[5]Frank Phillips...	58	Embezzlement	Psychosis with cerebral arteriosclerosis	Commitment	Yes	Sentenced to penitentiary
Herbert Sewell ...	19	Murder	Not insane	Not insane	No	Guilty
Delbert George...	29	Murder	Without psychosis; Mental deficiency; Moron	Not insane	No	Guilty
Charlie Graham ..	41	Murder	Dementia praecox	Commitment	Yes	Committed
Wm. Unwin.....	32	Rape	Without psychosis	Not insane	Yes	Guilty
Luther Hook.....	39	Larceny	Without psychosis	Not insane	No	*
Ethel McDaniel..	42	*	Without psychosis; Mental deficiency; Moron	Not insane	No	*
C. Blaine Scott...	41	Attempted murder with a deadly weapon	Traumatic psychosis; Traumatic constitution	Commitment	Yes	Committed
Alex Nieberger...	30	Bestiality	Psychosis with Mental deficiency	Commitment	No	Committed
C. W. Robertson .	35	Confidence game	Not insane	Not insane	No	*
Arthur N. Carr...	40	Assault with deadly weapon with intent to kill	Without psychosis; Epilepsy; idiopathic	Not insane	Yes	Guilty
Joe Brandon.....	35	*	Dementia praecox; Hebephrenic type	Commitment	*	Committed

*Information is not in the records.
[1]Patient killed husband's paramour and had the sympathy of the entire community. Judge did not commit patient after jury found her insane.
[2]Patient also at Colorado Psychopathic Hospital. Crime so brutal and patient so clear mentally jury found him sane and he was hanged.
[3]Patient was under supervision on parole from court in community but was committed two years later.
[4]Patient killed a brutal deputy sheriff. It was common gossip the community was benefitted by the act.
[5]Patient began peculation a number of years prior to onset of psychosis. Received active treatment while in hospital so that at time of trial was practically normal mentally.

EXPERIENCE IN OTHER STATES

The main significance of the Colorado statistics is that they are fairly typical of the results in other states having similar laws. In the percentage of cases reported by the hospitals as insane, Colorado's 39 per cent is to be compared with 41 ½ per cent in Vermont, and 25 ⅓ per cent in Ohio. For a more complete record of the diagnoses made by the hospitals, we may take the record of the Augusta State Hospital in Maine, where during the period of twenty years from February 14, 1914, to March 22, 1934, 189 defendants were committed and examined. The hospital's diagnoses in these 189 cases totalled as follows:

Not insane	80
Without psychosis	16
Psychopathic personality—not insane	1
Constitutional psychopath—not insane	1
Constitutional inferiority—not insane	4
Mental deficiency without psychosis	23
Mental deficiency	5
Mental deficiency with psychosis	3
Epileptic	1
Epileptic without psychosis	2
Epileptic with psychosis	1
Alcoholic	1
Acute alcoholic hallucinosis	2
Hallucinosis	1
Alcoholic psychosis	5
Paranoid alcoholic	1
Paranoid condition	4
Paranoid type	1
Dementia praecox—paranoid	3
Dementia praecox	8
Manic depressive	7
Manic depressive—Manic	5
General Paralysis	8
General Paralysis—Cerebral	2
Senile psychosis	1
Neuro-syphilis	2
Sclerotic	1

The willingness of both counsel and juries to accept the findings of the hospitals, and the consequent elimination of controversy over the question of sanity or insanity, is the outstanding accomplishment of the laws of all these states. Thus, under the Maine law, Superintendent Forrest C. Tyson of the Augusta State Hospital has informed the writer that during the twenty-one years of his service at that institution, there have been 202 cases committed for observation, 27 of them persons indicted for murder. In only two cases have attorneys for the defense refused to abide by the hospital's finding. In those two cases—and in no others—other psychiatrists were

retained to testify contrary to the hospital's report. In neither case, however, did the defense succeed, both defendants being found guilty and sentenced. The subsequent clinical records of the two have borne out the hospital's original diagnoses. Under the same law, Superintendent Carl J. Hedin of the Bangor State Hospital reports that during the sixteen years he has held that position, 58 persons have been sent to that institution for observation. In 55 of these cases, the jury accepted the hospital's finding. Other expert testimony is rarely introduced.

For the benefit of those who fear the hospital authorities will be too prone to fine all persons charged with crime to be insane, it may be interesting to notice that in the eighty-eight years that the Maine law has been in operation, there have been only eight murder cases in which the defendants were found not guilty by reason of insanity.

The Vermont law is almost identical in wording with that of Maine. During the past fifteen years, 90 cases have been committed to the Vermont State Hospital under this law. Of these, 52 have been reported back as not insane, 37 as insane, and one as undiagnosed (a non-resident who was transferred back to her home state). In only one case was the hospital opposed by an alienist retained by the defense, and there the jury, accepting the testimony of the hospital rather than that of the defense, found the defendant guilty. Indeed, in Vermont, the confidence of all concerned in the hospital's findings seems to be such that its finding, reported to the prosecutor and to counsel for the defense, is usually sufficient; in only fourteen of the 90 cases diagnosed did a member of the hospital staff testify at the trial. In the others, the insanity defense was disposed of without any testimony on the subject. If the defendant is reported insane by the hospital, the court commits him to the hospital; if the hospital finds him sane, he is ordered to stand trial, and, with the single exception mentioned, counsel has dropped the insanity defense.

Under the Ohio law, enacted in 1929, 71 persons have been committed to the Lima State Hospital for the criminal insane for observation. Of these, 18, or slightly over 25 per cent, were found insane. Dr. R. E. Bushong, superintendent of the hospital, states that in homicide or other serious cases, where the defendant has financial resources to employ high-priced lawyers, an attempt is sometimes made to prove the defendant insane even when the hospital has found him sane, but that he knows of no case in which the jury has acquitted a defendant under such circumstances.

In some of the larger cities, psychopathic clinics are conducted in connection with the municipal courts, with facilities for holding patients for observation. Milwaukee County, for example, has a Mental Hygiene Clinic which has been able to make accurate examinations of the patients referred to it. The Wisconsin legislature has been contemplating establishing a Diagnostic Center, to which all cases of suspected mental abnormalities would be sent, instead of to the various state institutions. After a period of residence at this center, the patient would be transferred to the institution which it was felt was best suited to care for him. This would eliminate in Wiscon-

sin the practice now current not only there but in practically all states, of making commitments to some specific institution, without much knowledge on the part of the committing court as to whether that institution is best suited for the individual's needs or not.

AN ALTERNATIVE SOLUTION: APPOINTMENT OF EXPERTS BY THE COURT

A provision which might be considered as a substitute for commitment to a hospital is one permitting the court to appoint experts to examine the defendant and report. At least five states now have statutes permitting such appointments when the issue of criminal responsibility is involved;[12] eight when the question is the defendant's present capacity to stand trial,[13] and three for either or both purposes.[14]

The Model Code of Criminal Procedure, promulgated by the American Law Institute in 1930, includes such a provision.[15] This seems, however, to add nothing

[12] CAL. PENAL CODE (Deering, 1931) §1027; see also CAL. CODE CIV. PROC. (Deering, 1931); §1871; Colo. Laws 1927, c. 90, §2; Ind. Acts 1927, c. 102; IND. ANN. STAT. (Baldwin, 1934) §2216; R. I. GEN. LAWS (1923) §5002; VT. GEN. LAWS (1917) §2620. See also Iowa Acts 1933-34, Extra sess., c. 133, p. 257 (when a party to any legal action, suit or other judicial proceedings pleads his own mental incapacity, any other interested party may apply to have such person produced for examination as to mental capacity by physicians chosen by the applicant.) Inquiry of the Attorney General of Iowa has failed to elicit any information as to whether this statute is to be construed to apply to criminal cases.

[13] ALA. CODE (1928) §4577 (judge must call "a respectable physician"); Conn. Pub. Acts 1931, p. 269 (investigation by two or three "reputable, disinterested and qualified physicians" appointed by the judge); IND. ANN. STAT. (Baldwin, 1934) §2216 (judge shall appoint "two competent disinterested physicians" who shall examine defendant and testify at the hearing); KY. STAT. (Carroll, 1930) §§2162a-68-2162a-74 (similar to Indiana); MO. ANN. CODE (Bagby, 1924) art. 59, §8; MICH. COMP. LAWS (1929) §17241, as amended, Mich. Pub. Acts 1931, No. 317, p. 531; PA. STAT. (Supp. 1928) §14726a-308 (court may order inquiry by two "qualified physicians," or by a commission of two "qualified physicians" and one lawyer); VA. CODE (Michie, 1930) §4909.

[14] La. Acts 1932, No. 136; N. Y. CODE CRIM. PROC. §§658, 659 (on plea of not guilty by reason of insanity, court may appoint a commission of not more than three "disinterested persons" to examine defendant and report to the court). It has been held this report must cover his sanity both at the time of the act charged, and at the time of the investigation. People v. Whitman, 149 Misc. 159, 266 N. Y. Supp. 844 (1933). See also N. Y. CONSOL. LAWS (Cahill, 1930) c. 31, §31; N. Y. CODE CRIM. PROC. §836, as amended, N. Y. Laws 1933, c. 564; WIS. STAT. (1933) §357.12 (3).

[15] *Section 307. Examination of defendant's mental condition to determine whether he shall be tried.* (1) If before or during the trial the court has reasonable ground to believe that the defendant, against whom an indictment has been found or information filed, is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

(2) If the court, after the hearing, decides that the defendant is able to understand the proceedings and to assist in his defense it shall proceed with the trial. If, however, it decides that the defendant through insanity or mental deficiency is not able to understand the proceedings or to assist in his defense it shall take proper steps to have the defendant committed to the proper institution. If thereafter the proper officer of such institution is of the opinion that the defendant is able to understand the proceedings and to assist in his defense, he shall report this fact to the court which conducted the hearing. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is able to understand the proceedings and to assist in his defense. This hearing shall be conducted in all respects like the original hearing to determine defendant's mental condition. If after this hearing the court decides that the defendant is able to understand the proceedings against him and to assist in his defense it shall

to the common law. Even without the aid of such a statute, trial courts have at times appointed expert witnesses to examine the accused as to his mental condition,[16] and this practice has been approved.[17] It is true that the Michigan Supreme Court, by a strange process of reasoning, has held that the courts do not have this power, even where a statute expressly undertook to confer such power,[18] and this reasoning has been followed by the Illinois court.[19]

It is probable, however, that the courts of other states will not become infected with this dykastophobia, as Dean Wigmore called it, but will continue to permit trial courts to call in expert witnesses where proper. While, as we have said, this seems to have been a common law power of the courts, it is probably true that the judges will be more likely to make use of the power where it is expressly provided for by statute. Such a provision does have the virtue of introducing scientific testimony regarding the defendant's mental condition other than the paid and partisan testimony of the experts brought in by the parties. California and Indiana have gone somewhat further than the Model Code, by making the appointment of such experts mandatory instead of merely permissive.[20]

SUPERIOR MERITS OF HOSPITAL COMMITMENT

Beyond this, however, there is not much that can be said for such a procedure. It is definitely inferior to the procedure for commitment to a state hospital. It is not a satisfactory method to ask psychiatrists to make an important examination in a jail or prison. Such an examination does not compare with the type of examination made in any modern hospital, and is not fair either to the prisoner, or the state, or to the examiner as a scientific man. Such an examination should be supplemented by prolonged observation in a different and more natural environment. In 1928, a

proceed with the trial. If, however, it decides that the defendant is still not able to understand the proceedings against him or to assist in his defense it shall recommit him to the proper institution.

Section 308. Appointment of expert witnesses by court. Whenever on a prosecution by indictment or information the existence of insanity or mental defect on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the court may appoint one or more disinterested qualified experts, not exceeding three, to examine the defendant. If the court does so, the clerk shall notify the prosecuting attorney and counsel for the defendant of such appointment and shall give the names and addresses of the experts so appointed. If the defendant is at large on bail, the court in its discretion may commit him to custody pending the examination of such experts. The appointment of experts by the court shall not preclude the State [Commonwealth or People] or defendant from calling expert witnesses to testify at the trial and in case the defendant is committed to custody by the court they shall be permitted to have free access to the defendant for purposes of examination or observation. The experts appointed by the court shall be summoned to testify at the trial and shall be examined by the court and may be examined by counsel for the State [Commonwealth or People] and the defendant.

[16] State v. Cockriel, 314 Mo. 699, 285 S. W. 440 (1926); State v. Petty, 32 Nev. 384, 108 Pac. 934 (1910); State v. Paine, 49 La. Ann. 1092, 22 So. 316 (1897); State v. Genna, 163 La. 701, 112 So. 655 (1927).

[17] People v. Linton, 102 Cal. App. 608, 283 Pac. 389 (1929); State v. Genna, *supra* note 16; State v. Horne, 171 N. C. 787, 88 S. E. 433(1916).

[18] People v. Dickerson, 164 Mich. 148, 129 N. W. 199 (1910).

[19] People v. Scott, 326 Ill. 327, 157 N. E. 247 (1927).

[20] Statutes cited, note 12, *supra*.

committee of the American Psychiatric Association recommended that expert witnesses should be given "opportunity for thorough psychiatric examination using such aids as psychiatrists customarily use in practice, clinics, hospitals, etc., with obligatory written reports and remuneration from public funds."[21]

Secondly, all too often, the "experts" appointed under such statutes are such in name only. Any practicing physician can qualify as an "expert" on insanity, even though he never studied psychiatry or handled a mental case in his life. True, some statutes as well as the Model Code make a gesture toward limiting the field by referring to "disinterested qualified experts" but there is no definition of what is required to "qualify" one as an expert.[22] All we can say for such provisions is that they do bring into the case *impartial* experts, not paid to support either side of the case; but there is no guaranty that such witnesses will be any better qualified to diagnose the case than those retained by the parties, nor is the opportunity for scientific diagnosis improved.

If it be suggested that commitment may be more expensive, the writer ventures to guess that the reverse is more likely to be the case. The cost of maintaining one more patient in an existing hospital for thirty days is not great; so far as salaries are concerned, the added cost is nil, unless the number of such cases grows so large that it is necessary to add to the hospital staff. Even in this case, it would still probably be cheaper to add another member to the hospital staff, and to pay the added annual salary of one more doctor, rather than to hire from one to three experts to examine each of these cases, with fees ranging from $25 to $100 per day per expert.

The superior merits of the commitment procedure is demonstrated by the experience of states where both procedures are available. This is true in Colorado and Vermont. The Colorado law, as we have said, makes commitment mandatory, and the appointment of experts by the court only discretionary, so there is, perhaps, no fair basis for comparison. However, it is significant that commitment to the hospital has been found sufficient. It is very rare for the trial court also to appoint experts to examine the defendant. In Vermont, both provisions are discretionary. Section 2620 of the Vermont General Laws authorizes a superior judge or the attorney general, to prevent a failure of justice, to order an examination made by the experts. The order is made only on the petition of the state's attorney, stating the facts requiring

[21] Menninger, *supra* note 7, at 376.

[22] Some of the statutes do require that the "experts" actually be specialists in mental diseases, or at least have had some actual experience in a hospital for mental diseases. CAL. PENAL CODE (Deering 1931) §1027 (court must appoint two or three "alienists, at least one of whom must be from the medical staffs of the state hospitals"); La. Acts 1932, No. 136 ("By qualified experts in mental diseases is meant a physician expert in insanity who shall have been duly licensed in this State or another State and shall have been graduated from a legally chartered medical school or college, and who shall have been in the actual practice of medicine for three years last preceding the acceptance of appointment for examination and who shall have had at least one year's experience in a hospital for mental diseases actually in contact with and examining insane persons or who shall have practiced as a specialist in nervous and mental diseases for a period of at least three years"); N. Y. CODE CRIM. PROC., §836, as amended, N. Y. Laws 1933, c. 564 (court may call two physicians . . . at least one of whom shall be a qualified psychiatrist as provided by law"). See Strauss, *The Qualification of Psychiatrists as Experts, infra*, p. 461.

the order, and naming the experts by whom examination is to be made. Section 2602 authorizes the trial judge, where a plea of insanity is made, or the trial judge is satisfied it will be made, to order the defendant into the care of the superintendent of the Vermont State Hospital for detention and observation "that the truth or falsity of the plea may be ascertained." In practice, the latter provision is the one used; there seems to be no instance in which a court appointed experts to examine a defendant's mental condition under section 2620.

It therefore seems unfortunate that the reporters who drafted the Model Code merely provided in sections 317 and 318 for appointment of experts. It should be pointed out that as a footnote to these sections, the reporters appended alternative provisions recommended for "states where there is a public institution or institutions for investigating the mental condition of persons, to which defendants can be conveniently committed for examination," which do not change the wording of these sections except to give the court the choice either to appoint experts to examine the defendant, or to "commit the defendant to the proper institution for observation and examination." Just why this much more useful provision should be included only in small type as a substitute, instead of as the primary recommendation, is not clear. The only reason seems to have been that not all states have institutions to which defendants could be committed for observation and examination. It is submitted that by far the majority of states do have such facilities, and that those which do not are probably also not well supplied with psychiatrists who could be deemed "qualified experts," so that even such states are probably in no better position to use the one provision than the other.

The most unfortunate effect of the typography adopted by the framers of the Code is that the printing of the less useful recommendation in big bold-faced letters and the other in much smaller type, as a substitute, may seem to imply that the former is its first choice. Such a result would make the Code an obstacle to progress rather than a help. And this seems to be the implication which some legislatures have been given. Louisiana, for example, in 1932 adopted a law which follows the wording of the Model Code (except that the Louisiana law corrects an obvious defect by defining "qualified experts").[23] Louisiana has two state hospitals to which the criminal insane might be committed for observation, and its legislature had already shown a willingness to experiment with the problem.[24] Furthermore, its supreme court had already held that the trial courts have power to appoint experts in these cases, without the aid of a statute.[25] Why then did Louisiana adopt the ineffectual statute it did? We can only guess, for the legislative journals reveal no reason, and neither the Attorney General's office nor the superintendents of the two state hospitals know what the reason was.[26] However, having decided to make the change,

[23] La. Acts 1932, No. 136.

[24] See La. Acts 1928, No. 17; LA. CODE CRIM. PROC. (Dart, 1928) arts. 267-273.

[25] State v. Genna, 163 La. 701, 112 So. 655 (1927).

[26] Dr. S. T. Phillips of the Central Louisiana State Hospital suggests the possible reason that a large

it is clear that the legislators turned to the Model Code for their new law, and adopted what evidently seemed to be that Code's primary recommendation.

DETAILS OF DRAFTSMANSHIP

In drafting statutes of the type which the Model Code actually recommends for the majority of states, one or two details may be considered. The substitute for section 318 requires that the hospital authorities "prepare a written report regarding the mental condition of the defendant insofar as this indicates what was his mental condition at the time of the alleged offense. Such officer shall be summoned as a witness at the trial and may be examined by the judge or by either party."

It may be questioned whether this language is not too neat and complete. A less specific, more loosely drawn statute might permit a good deal of informality such as is practiced in most of the states now having such provisions. Thus, for example, in Maine no written reports are given out, and Superintendent Tyson of the Augusta State Hospital is of the opinion that this is the better practice; that when such reports are made public, the attorneys have too much opportunity to pick minute flaws in them, build up hypothetical issues, and generally fine-comb the report for legalistic, as distinguished from scientific, discrepancies; furthermore, that such reports are "hot stuff" for the newspapers. Whether this point of view is correct or not, it would seem wiser to permit the courts and the hospital to work this out as a matter of custom, rather than embody a definite rule in the statute.

Again, the Model Code definitely says the hospital officer *shall* be summoned as a witness at the trial. In Maine, in minor cases at least, the court disposes of the case upon the hospital's report, without requiring any member of the staff to testify at the trial, and in Ohio and Vermont, it has been found unnecessary to call the hospital officials in the great majority of cases. In 76 cases out of the 90 which have arisen under the Vermont law, the hospital's report to the defense and to the prosecutor has been found sufficient to dispose of the insanity issue. At the Colorado State Hospital, a member of the staff has been asked to testify in only twenty-one out of forty-one cases. Here again, it would seem wiser not to make the statutory rule too rigid. To provide that the hospital officers "may" be called as witnesses would seem to cover the situation, without imposing unnecessary formality where it can be avoided.

MORE RADICAL INNOVATIONS

A word of warning may be in order to legislative draftsmen who may be inclined to carry this reform further. States which have departed too far from the accepted

number of defendants were pleading insanity merely as a last means of escape, and sitting on commissions to examine such cases consumed a large part of the time of the heads of the institutions. Dr. Jackson J. Ayo of the East Louisiana State Hospital suggests that the change was made to permit the examination to be made in the local parish, and thus save expense. The Attorney General's Office points out that the exclusion of the state from ever prosecuting the defendant after the commission found him insane may have been considered unsatisfactory.

modes of procedure, especially in attempting to take the question of the defendant's mental condition entirely away from the jury, and place it into the hands of a body of experts, have met constitutional difficulties. Louisiana presents a case in point. In 1928, that state adopted a very ingenious procedure, under which a defendant interposing a plea of insanity was first examined by a commission, made up of the superintendents of the two state insane hospitals and the coroner of the parish. If this commission found him sane, either presently or at the time of the offense, he was committed to the criminal ward of a hospital without further ado. A finding that the defendant was insane at the time of the act charged precluded the state from ever bringing him to trial on the indictment, thus saving the expense and trouble of a criminal trial. Even if the commission found him presently sane, though insane at the time of the act, he could still be committed, in order that by observation over a period of time, it might be determined whether he could with reasonable safety be returned to society. If the commission found him sane, he still was given a judicial hearing on the issue, as in other cases.[27] If found sane, he was then tried upon the other issues in the case. If found insane, he was forthwith committed to the criminal ward of a state hospital. This procedure was held constitutional.[28]

Soon after its enactment, however, a radical revision of this procedure was attempted by a law which made the decision of the commission conclusive in all cases, whether its finding was that the defendant was sane or insane, and permitted no judicial hearing on the issue of insanity whatsoever, either with or without a jury. This was declared unconstitutional. The defendant has a right to a jury trial on all the issues in the case, and his mental capacity to commit the crime is one of the essential elements of the crime upon which he is entitled to a jury verdict.[29]

Since that time, the Louisiana law has been completely repealed, substituting therefore the provision found in section 318 of the Model Code, authorizing the trial court in such cases to appoint from one to three experts to examine the defendant where the defense of insanity is raised.[30]

The 1928 law seems to have been an interesting one. It had the great merit of frankly accepting, so far as the state is concerned, the finding of the state's own experts. Where the superintendents of the two hospitals and the coroner of the parish, all state officials, agree that a defendant is mentally irresponsible, it seems both humane and economical to provide that such finding shall bind the state's prosecutor

[27] As a matter of fact, however, the Louisiana law had the same practical result as found in other states having laws providing for official examination before trial: counsel for the defense invariably accepted the finding of the commission. Superintendent S. J. Phillips of the Central Louisiana State Hospital informs the writer that during the four years the law was in effect, he knows of no instance in which, after the commission had reported the defendant "sane," counsel tried to contest that issue before a jury.

[28] State v. Burris, 169 La. 520, 125 So. 580 (1929); State v. Toon, 172 La. 631, 135 So. 7 (1931); State v. Harper, 172 La. 1067, 136 So. 54 (1931).

[29] State v. Lange, 168 La. 958, 123 So. 639, 67 A. L. R. 1447 (1929). See also State v. Strasburg, 60 Wash. 106, 110 Pac. 1020 (1910); Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931).

[30] La. Acts 1932, No. 136.

and shall settle the question of mental condition. At the same time, the act did not preclude the defense from taking the issue to the jury, if the commission's finding was adverse to the defendant's contention of insanity.

It is unfortunate that this sensible provision was dropped in favor of the much less effective provision of the Model Code. Other states might well consider its adoption, especially when incorporated into a statute providing for observation in a state hospital. The writer ventures to suggest a possible wording of such a statute:

Commitment to Institution for Examination

(1) Whenever on any criminal prosecution the existence of insanity or mental defect on the part of the defendant either at the time of the alleged commission of the offense charged, or at the time of the criminal proceedings becomes an issue in the cause,[31] or the court has reasonable ground to believe that it may become an issue in the cause, the court may commit the defendant to [the proper institution] for a period not to exceed thirty days for observation and examination, and direct that the chief medical officer of such institution report to the court regarding the mental condition of the defendant both as of the time of the alleged offense and presently.

(2) If said report be that the defendant was insane and irresponsible at the time of the commission of the offense, the court may dismiss the charge against him, and forthwith commit him to [the proper institution for the criminal insane], there to remain until discharged in due course of law.

(3) If said report be that the defendant was, at the time of the commission of the offense charged, not mentally irresponsible, but that he is presently too insane to understand the proceedings against him or to assist in his defense, the court may forthwith commit him to [the proper institution for the criminal insane]. If thereafter the proper officer of such institution is of the opinion that the defendant is able to understand the proceedings and to assist in his defense, he shall report this fact to the court which conducted the hearing, which shall thereupon proceed with the trial.

(4) If said report be that the accused was sane and responsible at the time of the commission of the offense, and is now mentally able to understand the proceedings against him and to assist in his defense, the trial shall be proceeded with as in other cases. The officer of the institution making the report may be summoned as a witness at the trial and may be examined by the judge or by either party. The action of the court in committing the defendant for examination shall not preclude the State [Commonwealth or People] or defendant from calling expert witnesses to testify at the trial, and they shall be permitted to have free access to the defendant for purposes of observation and examination while the defendant is in custody or in an institution.

Such a statute would accomplish directly and simply what is now being accomplished at considerably more expense and trouble in the four states having provision for hospital commitment but where the requirement of trial is preserved even though the examiners' finding is that the defendant was insane at the time of the commission of the offense. As we have seen, the jury in these states almost invariably

[31] In eight states, the issue of insanity can be raised only on a special plea of "not guilty by reason of insanity." The writer has not included such a provision in this proposed statute in order not to become involved in the question of the desirability of requiring such a special plea, a matter collateral to our inquiry. If such a special plea should be required, this statute could read, "*Whenever such a plea of insanity is made*, the court may commit the defendant . . ." etc.

accepts the finding of the hospital authorities. Also, trial judges have the power, if they wish to exercise it, of instructing the jury to return a verdict in accord with the hospital's finding. Thus, in Maine, upon a report and testimony by the hospital officer that the defendant was insane and irresponsible at the time of the offense charged, some of the judges order the prosecution to put on enough evidence to establish the facts of the crime, and then instruct the jury to bring in a verdict of not guilty by reason of insanity. While this does not eliminate the expense and trouble of a trial, it does reduce the trial to little more than a *pro forma* proceeding.

In Vermont, upon report by the hospital that the defendant is mentally irresponsible, the case is sometimes *nolle prossed* and the defendant committed to the hospital through the probate court as any ordinary patient. In a few cases, upon receipt of such a report, the State's Attorney has simply taken no action, but has allowed the defendant to remain in the hospital under the original commitment (such commitment, under the Vermont law, being not for any limited period, but "until further order of the court").

But these are round-about means of avoiding the useless formality of a criminal trial, and are not likely to be employed except occasionally by courageous judges. A statute of the sort proposed above would expressly authorize the courts to dismiss the criminal charge and commit the defendant to a hospital in all cases where the hospital authorities report him to be mentally irresponsible. Of course, if the hospital finds him sane, he is still entitled as a constitutional right to go to the jury on his contention that he is mentally irresponsible. But where he contends that he is not guilty by reason of insanity, and the state's own hospital authorities agree with him, why should not the state accept that finding, dismiss the criminal proceedings and commit him as insane?

Such a provision would add to the advantages of the statutes of the four states mentioned the further virtue of economy. An important criminal trial may cost the state several thousand dollars. The elimination of only one such trial each year would probably cover the cost of commitment for observation of all defendants whose sanity is in question.

THE HISTORY AND OPERATION OF THE BRIGGS LAW OF MASSACHUSETTS

WINFRED OVERHOLSER*

The problem of the mental capacity of persons accused of crime is one which has for several centuries been of considerable interest to the courts. Apparently prior to the middle of the eighteenth century, however, no great difficulty was experienced by the court in obtaining reliable evidence on this question—since at that time the experts were called in by the court as *amici curiae*. During the past two hundred years, however, the position of the experts has tended to develop into that of partisans,[1] and criticism has been widespread and caustic on the part not only of judges and lawyers but of the general public.[2] By reason of the sensational nature of the crime charged in some cases where insanity is pleaded as a defense, undue attention has been focused by the public upon the rôle of the psychiatrist as an expert witness in criminal trials, despite the well recognized abuses of other types of expert testimony, criminal and civil alike. If criticism has been rampant, however, it cannot truthfully be said that no attempts have been made to improve the situation. Some of these attempts have partaken of the nature of action by professional societies, but the ones which concern us particularly are those which have been enacted into legislation.

Of the types of legislative cures proposed, the most common has been that conferring upon the court the right or the duty, in certain specified cases, of appointing neutral experts. Certain practical objections have been made to this method,—notably the fact that the judge may not be properly qualified to pass on the ability of the expert; the fact that politics may become a consideration in the appointment of

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[1] 4 WIGMORE, EVIDENCE (2d ed. 1923) §1917, pp. 100-109. For a consideration of the historical development of rules governing the expert witness in Anglo-American law, see Rosenthal, *supra*, at p. 403.

[2] "Hardly any weight is to be given to the evidence of what are called scientific witnesses." Tracy Peerage Case, 10 Cl. & F. 154 (1839). "Expert testimony is regarded by the law as the weakest character of testimony." Ky. Traction Co. v. Humphrey, 168 Ky. 611, 182 S. W. 854 (1916).

the expert;[5] and that in any event the initiative must come from the defendant by the introduction of a plea of insanity. One of the early attempts (1910) was that of the State of Washington, which proposed to remove consideration of mental condition from the trial, leaving the disposition to be determined after the innocence or guilt of the commission of the act itself had been passed upon. This legislation was declared unconstitutional by the Supreme Court of that State.[6] More recently (1928) the State of Louisiana proposed to make the findings of a specially constituted commission final; but this act too was declared unconstitutional, on the ground that the accused had the right to have the defense of insanity, like any other defense, considered by a jury.[7] The State of California in 1927[8] complicated matters by setting up a double trial—the first on the question of guilt or innocence of the act, and the second on the question of insanity at the time of the act; this to be applicable in cases where a special plea of insanity was introduced. This procedure has been rather severely criticised by judges and legal writers in its native state, and certainly is not a fundamental cure, even though it was modified in 1929 by provision for the court appointment of experts.[9] The State of Mississippi (1928) abolished entirely the defense of insanity, but this law was declared unconstitutional.[10] The State of Colorado[11] *requires* the commitment to a mental hospital of any defendant who pleads not guilty by reason of insanity—such commitment to be for an observation period. This provision does well as far as it goes, but again it is dependent upon the initiation of a plea of insanity. There is no assurance that a case of mental disorder may not pass unrecognized, with a resulting unfairness to the defendant, and, on the other hand, there is no discouragement to the introduction of a plea of insanity which may be well known to the attorney to be specious. The fact that in 1934 a total of only 31 cases were referred by all the courts of the Commonwealth of Massachusetts for mental examination under an optional statute[12] serves to suggest that the selection of suitable cases by the courts can hardly be counted upon!

[5] An editorial in the Boston *Post* of February 28, 1929, illustrated well the extremes to which favoritism and nepotism may go. According to the editorial, relatives of the county judges of Kings County, New York City, received $140,000 in fees for services on lunacy commissions during 1928. One of these relatives was an ophthalmologist, one an obstetrician, and one a dealer in pianos!

[6] State v. Strasburg, 60 Wash. 106, 110 Pac. 1020 (1910). See Rood, *Statutory Abolition of the Defense of Insanity in Criminal Cases* (1910) 9 MICH. L. REV. 126.

[7] State v. Lange, 168 La. 958, 123 So. 639 (1929).

[8] Cal. Acts 1927, c. 677. See Shepherd, *The Plea of Insanity Under the 1927 Amendment to the California Penal Code* (1929) 3 So. CALIF. L. REV. 1.

[9] CAL. PENAL CODE (Deering, 1931) §1027.

[10] Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931).

[11] Colo. Acts 1927, c. 90. For a discussion of the operation of the Colorado law and analogous statutes, see Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, *supra*, pp. 422-432.

[12] MASS. ANN. LAWS (Michie, 1933) c. 123, §99. Unlike the Briggs Law, quoted *infra*, p. 440, under which the reporting of cases for examination is mandatory but which is limited to capital cases and to persons under indictment who had previously been indicted more than once or convicted of felony once before, this provision authorizes the presiding judge, "in his discretion," to request examination "in order to determine the mental condition of *any* person coming before *any* court of the commonwealth." (Italics added.) The smallness of the number of cases in which this power has been exercised is all the more

There is a remarkable unanimity of legal writers to the effect that the Massachusetts procedure relative to persons accused of crime is by far the most advanced step which has yet been taken in meeting the criticism leveled at the prevalent practice of the use of experts in criminal trials, and for this reason it seems proper to consider it in some detail in connection with a symposium on the general problems relating to expert testimony.[11] The credit for the conception and the enactment of this law belongs to Doctor L. Vernon Briggs of Boston, a prominent physician who has long been active in initiating and encouraging psychiatric progress in Massachusetts. It was first proposed by Dr. Briggs in 1921 in his volume entitled, *The Manner of Man That Kills*,[12] as being a form of law necessary to any scheme which purports to be fair to the defendant accused of serious crime and as a practical means of correcting the abuses of psychiatric expert testimony in criminal trials. In 1921 Governor Channing H. Cox in his inaugural address made certain recommendations regarding the treatment of offenders, which were referred to the Committee on Public Health of the Legislature. Dr. Briggs urged upon this Committee, during its consideration of the Governor's message, the reporting of a law to provide for an investigation by the Department of Mental Diseases as to the mental condition of certain persons held for trial. Dr. Briggs had already consulted with a number of prominent attorneys, including the President of the Massachusetts Bar Association, and with the Commissioner of Probation, who spoke in behalf of the bill. It is somewhat interesting to note that the original misgivings relative to the constitutionality of the bill came from physicians rather than from the lawyers. The principal opposition came from the clerk of one of the larger courts who organized a lobby against the bill—apparently in the fear that it would cause too much additional work!

In spite of this opposition the bill was enacted as Chapter 415, Acts of 1921, providing, essentially, that a person indicted for a capital offense or any person known to have previously been indicted more than once, or previously convicted of a felony, should be examined by the Department of Mental Diseases, "with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility." Provision was also made that this report should be accessible to the court, the district attorney and the attorney for the accused, and should be admissible as evidence on the mental condition of the accused. No fee was provided for this examination, and it seems probable that it was hoped by the opponents of the bill that this omission would be fatal to the proper operation of the

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noteworthy in the light of the volume of cases to which it extends, since it is applicable equally to all civil as well as to all criminal cases.

[11] For a detailed study of the Briggs Law, with full bibliography, see Overholser, *The Briggs Law of Massachusetts: A Review and an Appraisal* (1934-35) 25 J. CRIM. L. & CRIMIN. 859-883. The author is greatly indebted to Dr. L. Vernon Briggs for much of the original information embodied in the present paper. Doctor Briggs opened his files to the author, and communicated much of the historical data here presented. See also Briggs, *Conditions and Events Leading to the Passage of the Massachusetts Law Commonly Called the "Briggs Law,"* 12 BULLETIN, MASS. DEPT. MENTAL DISEASES, Nos. 1 & 2, pp. 2-5.

[12] At pp. 16-17.

law. Nothing daunted, however, Dr. Briggs secured from the practicing psychiatrists of Boston an agreement that they would make the examinations without remuneration until such time as a fee could be provided. We thus find illustrated at the outset the necessity of individual initiative and the coöperation of interested parties as essential to the proper functioning of a law. It should be said at this point that the continued interest and active support by Dr. Briggs have done much to bring about the continuing and increasing effectiveness of the Briggs Law.

In 1923, upon the recommendation of the Commissioner of Mental Diseases, Dr. George M. Kline, the statute was amended[13] to provide a fee—this fee being four dollars for each of the examining physicians plus a mileage allowance of twenty cents per mile one way. It seems safe to say that this fee, although to a small extent a recognition of the monetary value of the services rendered, is hardly large enough to be considered a basis for venality on the part of the examiners! In his annual reports for 1923[14] and 1924,[15] the Attorney General recommended that the law be further amended to strike out the provision that the report should be admissible as evidence on the ground that under the law the Commonwealth could not constitutionally offer such a report as evidence, although the defendant might, such an arrangement being manifestly unfair. On the basis of this recommendation of the Attorney General, the Legislature in 1925 struck out this provision for admissibility and also provided a penalty for wilful non-compliance by clerks of court.[16] In spite of the penalty, and in spite of the fact that some increase in the number of cases reported was being noted, it was obvious from the figures that many defendants were not being reported, even though their previous records undoubtedly rendered them eligible for examination. The Commonwealth of Massachusetts was fortunate in having already existing a central bureau of records, centralized in the Board of Probation, a probation officer in every court, and a statutory provision that before a defendant was admitted to bail by the court the probation officer should ascertain his previous record.[17] Accordingly, on the petition of Doctor Briggs and Senator Samuel H. Wragg, the Legislature in 1927 provided that it should be part of the duty of the probation officer if he had in his possession information which indicated that a defendant came within the provisions of the Briggs Law, to report that fact to the clerk who should thereupon act upon this information.[18] An immediate and startling jump in the number of cases reported was noted. This amendment probably has had more to do with the efficient reporting of cases under the Briggs Law than any other. In 1929 on the petition of the Commissioner of Mental Diseases, Dr. Kline, the act was further amended[19] to provide that the report under the Briggs Law should be available to the probation officer of the court. This seemed only logical in view of the fact that under the Massachusetts law the probation officer is

[13] Mass. Acts 1923, c. 331.
[14] At p. 11.
[15] Mass. Acts 1925, c. 169.
[16] Mass. Acts 1927, c. 59.
[17] At p. 8.
[18] Mass. ANN. LAWS (Michie, 1933) c. 276, §85.
[19] Mass. Acts 1929, c. 105.

the official of the court who is charged with the duty of advising the judge as to pertinent facts to be considered in imposing sentence. No opposition to any of these proposed amendments was encountered, and it appeared that the general public, the courts and the legislature were content to abide by the judgment of the author of the law and of the Department of Mental Diseases in details of wording and in minor substantive changes.

One further provision seemed desirable. The original law, as we have seen, provided for the examination of persons indicted for a capital offense,—namely, first degree murder or accessory before the fact of first degree murder—as well as of those previously indicted more than once or convicted of a felony who were again before the court on an indictment or bound over for trial. Several instances had arisen in which persons with a previously clear record had been indicted for murder in the second degree, for rape, for robbery while armed, or for some other offense for which life imprisonment might be imposed but which were not capital offenses. In some of these cases there were psychiatric implications, and it seemed only fair that a defendant should be given the benefit of a mental examination before standing trial on a charge which might result in a life sentence. Accordingly, in 1930[20] and again in 1931,[21] on the recommendation of the Commissioner of Mental Diseases, Dr. Kline, the Legislature was asked to amend the Briggs Law by striking out the words "a capital offense" and inserting in place thereof the words "any offense punishable by death or imprisonment for life." On both occasions the proposed amendment failed of passage. The Judiciary Committee which heard the bill (the previous amendments had been heard by the Committee on Public Health, except the one in 1925 relative to the admissibility of the report as evidence) seemed somewhat skeptical of the proposal to increase the scope of the law, even though they were assured that the number of defendants coming under the provision would be relatively small. The failure of passage was due to legislative inertia rather than to active opposition —this, of course, being a fate which frequently overtakes new or progressive proposals.

Having thus reviewed at some length the legislative history of the Briggs Law, we may proceed to study the provisions of the law as it now stands. The statute[22] reads as follows:

"Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined, with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. Whenever the probation officer of such court has in his possession or whenever the inquiry which he is required to

[20] Mass. H. B. 38. [21] Mass. H. B. 69.

[22] MASS. ANN. LAWS (Michie, 1933) c. 123, §100-A.

make by section eighty-five of chapter two hundred and seventy-six discloses facts which if known to the clerk would require notice as aforesaid, such probation officer shall forthwith communicate the same to the clerk who shall thereupon give such notice unless already given. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held and the report shall be accessible to the court, the probation officer thereof, the district attorney and to the attorney for the accused. In the event of failure by the clerk of a district court or the trial justice to give notice to the department as aforesaid the same shall be given by the clerk of the superior court after entry of the case in said court. Upon giving the notice required by this section the clerk of a court or the trial justice shall so certify on the papers. The physician making such examination shall, upon certification by the department, receive the same fees and traveling expenses as provided in section seventy-three for the examination of persons committed to institutions and such fees and expenses shall be paid in the same manner as provided in section seventy-four for the payment of commitment expenses. Any clerk of court or trial justice who wilfully neglects to perform any duty imposed upon him by this section shall be punished by a fine of not more than fifty dollars."

A study of the wording of the law indicates the three essential features which, at least in such combination, are still unique, in spite of the fact that the law has been in successful operation for fourteen years. In the first place, the reference of the case is automatic, that is, it does not depend upon the introduction by the defendant of a plea of insanity or upon the alleged "recognition" by a jail official, attorney, judge, or some other non-psychiatrist, of mental disorder. Within the legal limits of the classes designated *every* person accused of crime is examinable in advance of trial, whether or not mental disease is suspected. The legal categories enunciated may safely be assumed to include the more "serious" offenders, if, indeed, any such distinction is to be drawn between classes of offenders. In a considerable number of instances prisoners have been examined who have had no counsel and in whose cases mental disease had not been suspected, even though it was clearly demonstrated by the examination. Secondly, the examination is made by impartial examiners. The request comes from the clerk of the court, the report is made to the clerk, and is accessible to the counsel for the defense as well as to the district attorney. The examiners are under no obligation to either side, and are asked merely to make a thorough and conscientious report. Third, the selection of the examiners is made by a professional, non-political department in the administrative branch of government, namely, the Department of Mental Diseases. Massachusetts is fortunate in that its Department of Mental Diseases has traditionally been free from politics and that, furthermore, the Department (consisting of a commissioner and four associate commissioners) is made up of a majority of qualified psychiatrists. Presumably the qualifications of psychiatrists may better be passed upon by other psychiatrists than by judges or the court officials, a fact which has been recognized by judges themselves in commenting upon the selection of experts.

A synoptic table indicating the development of the use of the law is presented below. I am happy at this point to express my indebtedness to Professor S. Sheldon

Glueck of the Harvard Law School, whose review of the statistics published in 1926 has been extremely helpful to the writer as the basis for his subsequent reports on the operation of the law:

Year (Ending Oct. 15)	Cases Reported	Cases Examined	Percent Not Examined	Insane	Observation Advised	Mentally Defective	Other Mental Abnormalities	Percentage Reported Abnormal
1921–1926. (5 yrs.)	367 (av.73.2)	295 (av. 59)	19.6	26	7	25	11	23.4
1927.....	138	87	37.	5	1	9	1	18.3
1928.....	239	179	25.1	6	6	21	13	25.7
1929.....	370	283	23.5	3	16	27	11	20.1
1930.....	654	521	20.3	4	23	44	10	15.7
1931.....	766	703	8.2	8	21	87	10	17.9
1932.....	909	817	10.1	6	26	68	19	14.5
1933.....	818	725	11.3	3	23	55	15	13.2
1934.....	911	782	14.1	5	20	52	6	10.6
Total..	5,172	4,392	....	66	143	388	96	....

Not examined, 780, or 15.1% of all cases reported.
Total, all classes, 693, or 15.8% of all cases examined.

Several facts of interest are noted on the perusal of this first table. First of all is the startling annual increase of the cases reported—beginning with a yearly average of 73.2 in the period 1921-1926 and reaching a peak in 1932 of 909, an increase of 1140 per cent! It will be noted that this increase began in the year 1927, at which time the previously described amendment relative to reports by probation officers was enacted. The explanation of the slight drop in the year 1933 is not entirely clear, although it is worth noting that a slight fall in the total number of indictments returned in the entire Commonwealth was noted also in that year, as against the preceding year. It will likewise be noted that the number of defendants reported who were not examined has fallen rather markedly. During the past four years it has apparently been a definite policy of the justices of the Superior Court to postpone disposition of cases known to come under the Briggs Law until an examination can be completed. The policy appears to be entirely consistent with the intent of the law, even though in the Vallarelli case[23] it was held that non-compliance with the statute does not invalidate the trial. Most of the defendants not examined were on bail, and it seems quite likely that a certain proportion will always be missed on this account, particularly in view of the fact that the court probably has no right to compel such examination.[24] It should be understood that not *all* defendants on bail are missed; indeed, a considerable number report for examination when requested to do so. Another point of interest is the fact that the number of defendants reported to be abnormal mentally is not so large as has been apprehended by many ill-informed persons. Not uncommonly the charge is heard that psychiatrists, if given a

[23] Commonwealth v. Vallarelli, 273 Mass. 240, 173 N. E. 582 (1930).

[24] This point has not been decided. The court at least has no power to order a physical examination. See Stack v. N. Y., N. H. & H. R. R. Co., 177 Mass. 155, 58 N. E. 686 (1900).

free hand, would find *all* defendants insane. The most effective rebuttal of this charge is that over a period of fourteen years, during which the psychiatrists have had a completely free hand, only 15.8 per cent of all cases examined have been reported to be either demonstrably abnormal mentally or in such mental condition that observation in a mental hospital seemed advisable.

A brief discussion of the facilities available for the care of mentally abnormal defendants in Massachusetts may be in order at this point. The court may commit a defendant as insane or for a period of observation without a jury trial and, indeed, even without medical evidence.[25] The procedure is so simple that there would seem to be no excuse for the court's not committing for observation a defendant concerning whose sanity doubt has arisen. It is a general rule that all defendants reported to be insane are committed to a mental hospital promptly, and that the most of those for whom observation is advised are so committed. In some of the latter cases the report may have been received too late, or it may be that sufficiently convincing reasons for observation commitment were not set forth by the examiners. The following table indicates the dispositions of this group during the four years from October 15, 1931 to October 15, 1934, inclusive:

	Commitment for Observation Recommended	*Committed*	*Per Cent Committed*
1931	21	13	62.8
1932	26	16	61.5
1933	23	16	69.6
1934	20	14	70.0

A defendant acquitted of homicide by reason of insanity must be committed to a mental hospital for a term of his natural life, and may be released by the Governor and Council if, upon investigation by the Department of Mental Diseases, they are satisfied that the prisoner may be released "without danger to others."[26] Massachusetts is one of the two states (New York being the other) which has a defective delinquent law providing for the indeterminate commitment to a special type of institution of delinquents found to be mentally defective.[27] Unfortunately the facilities are much overcrowded, and the courts have not employed this law very widely as a result of the inadequacy of facilities.

In the administration of the law the coöperation of the various groups of court officials and of the bar generally has been most gratifying. The judges, as has already been said, although somewhat hesitant at the outset, have particularly for the past four or five years been most coöperative in delaying disposition until the report can be received and in using all the means at their disposition to induce the defendant to undergo the examination. The defense attorneys have likewise been coöperative, and in many instances in which the defendant has declined to be interviewed have persuaded him that he should undergo the examination. The number of refusals

[25] MASS. ANN. LAWS (Michie, 1933) c. 123, §100.
[26] *Id.* §101.
[27] *Id.* §§113-124.

has been gratifyingly low. The district attorneys have shown an almost unanimous disposition to abide by the results of the examination, and in those instances in which a contest arises have tended to depend entirely upon the Department's examiners as their experts. If the report is to the effect that the defendant should be sent to a mental hospital, the motion for commitment is usually made by the district attorney.

An excellent example of the manner in which district attorneys, defense counsel, and experts coöperate under the Briggs Law occurred while this paper was in process of preparation (September 1935). The defendant, a former State Hospital patient, had shot and killed his wife under the influence of his delusions regarding her conduct. Examined under the Briggs Law, he was reported to be "insane." He was brought into the Superior Court in Worcester County and found "not guilty by reason of insanity" in a directed verdict after the district attorney had presented the evidence of the offense and that of the psychiatrists appointed by the Department. The proceedings took only a few minutes; there were no prolonged cross-examinations, no array of partisan witnesses replying to confusing hypothetical questions, no opportunity for journalistic criticism of "hired experts"; finally, the expense was minimal. This feature of expense alone would justify the Massachusetts procedure. Many costly trials (averaging at least $500 a day) have been avoided by the fact that the district attorney and counsel for the defense have been reliably informed in advance in cases in which the defendant was of unsound mind, and could agree on a suitable disposition. In any year the already low cost of the administration of the law has probably been saved several times over in this manner.

In general the defense attorneys as well have been inclined to abide by the result, although there have been a very few instances in which they have felt it incumbent upon them to attempt to contest the finding of sanity. The number of "battles of experts" has been extremely small, and in almost every instance if, indeed, not in all, the report of the Department has been accepted by the jury. In the fourteen years since the passage of the law, only one flagrant example of the introduction of a battery of experts has been observed, and that as recently as 1934. A considerable number of psychiatrists were imported by the defense at the expense of the Commonwealth, but failed to overturn the report of the Department's examiners. Apropos of this case, the Boston *Herald* commented editorially (June 6, 1935) as follows: " . . . In view of the conspicuously unsuccessful attack on the Briggs Law, Massachusetts courtrooms will probably be spared many years another scene like that in Dedham." Finally, the clerks and probation officers have been extremely helpful, and in fact the clerk of court who led the opposition to the law in the beginning told the writer, shortly before his death, that since observing its functioning he had come to consider the statute a valuable one.

It was, of course, inevitable that so novel a provision affecting criminal procedure should be brought to the attention of the Supreme Judicial Court of the Commonwealth for interpretation, and as a matter of fact several points have been decided as

to the rights of the defendants and as to the duties of the Department, as well as to the general purpose of the Briggs Law. In deciding the first case appealed (in 1926) the Supreme Judicial Court commented as follows[28]

"The examination is required in order that no person so indicted may be put upon his trial unless his mental condition is thereby determined to be such as to render him responsible to trial and punishment for the crime charged against him, and that he has no mental disease or defect which interferes with such criminal responsibility. It is the duty imposed by the statute upon these doctors and others similarly assigned by the Department of Mental Diseases to say what is the mental condition of an accused and whether he has any mental disease or defect affecting his criminal responsibility. . . . It is a necessary deduction from all the circumstances that the defendant was put upon trial on the indictment because the report of the Department of Mental Diseases upheld his criminal responsibility. He would not have been brought to trial without evidence of his mental condition if that report had not been to the effect that he was of sufficient mental power to be criminally liable for his act and was not insane. . . . Doubtless the judge knew of this report at the trial. . . . He was justified in considering it in connection with the motion for a new trial in the circumstances here disclosed. . . . The judge had a right to examine the cause suggested in the motion for a new trial in the light of the contents of this report, in order to aid him in ascertaining whether justice required that there be a new trial."

In another part of the same decision the impartial nature of the report was emphasized as follows:

"It is a matter of general knowledge that there are in the service of the Commonwealth under this department persons eminent for special scientific knowledge as to mental diseases. The examination under the statute, therefore, may fairly be assumed to have been made by competent persons, free from any disposition or bias and under every inducement to be impartial and to seek and ascertain the truth."

Judicial notice, then, is taken of the competence and impartiality of the examiners, and it is clearly indicated that the district attorney is not expected to bring to trial a defendant who is not pronounced to be sane and responsible. The figures already cited indicate that the district attorneys have of late, at least, followed the general lines laid down above. The expectation is further expressed that the trial judge was guided by the report.

In other cases coming before the same court it has been held (1) that noncompliance with the provisions of the Briggs Law does not invalidate the trial as a matter of law;[29] (2) that having been examined by impartial experts under the Briggs Law the defendant is not entitled *as of right* to a further examination at the public expense;[30] and (3) that the examination does not compel the defendant to give evidence against himself in violation of his constitutional rights.[31] No cases

[28] Commonwealth v. Devereaux, 257 Mass. 391, 152 N. E. 380 (1926).

[29] Commonwealth v. Vallarelli, *supra* note 23; Commonwealth v. Soaris, 275 Mass. 291, 175 N. E. 491 (1931).

[30] Commonwealth v. Belenski, 276 Mass. 35, 176 N. E. 501 (1931).

[31] Commonwealth v. Millen *et al.*, 195 N. E. 541 (Mass. 1935).

involving the Briggs Law have been so far considered in the federal courts. The constitutionality of the law has never been directly passed upon, but there seems to be no good reason to question it.

The query may very properly be made, "why is it that after fourteen years of successful operation of an extremely significant and progressive statute no other state has yet enacted similar legislation?" It would, of course, be erroneous to assume that no interest has been shown in the Briggs Law in other states, and it seems likely that this law has served as at least a suggestion or an inspiration to certain states in enacting laws designed to improve the status of expert testimony. Bills following closely the wording of the Briggs Law have in recent years been introduced both in New York and in Pennsylvania, but have not been enacted. Influential groups in certain other states, such as Kansas and New Hampshire, have gone on record as endorsing the principle of the law, but as yet their endorsement has not been translated into legislative action. A wealth of editorial newspaper comment, from Boston to Los Angeles, has been accumulated, and many articles in legal journals and treatises have praised the principle of the Briggs Law in such terms as "the most progressive legislation on the insanity defense," and "one of the greatest steps in the introduction of medical thought into the law."[32] In 1930, also, the Sub-Committee on the Medical Aspects of Crime of the National Crime Commission strongly urged the adoption of the Briggs Law by other States. A significant fact relative to the possible adoption of the Briggs Law principle in other states is the inclusion by the Committee on Medico-Legal Problems of the Section of Criminal Law of the American Bar Association in its model expert testimony statute of Section 8, which is an almost exact copy of the Briggs Law of Massachusetts.[33] The endorsement of this Committee should certainly go far toward securing legislative approval of the principle in other states. It should perhaps be borne in mind that not all states have a situation closely comparable to that of Massachusetts,—either in the field of the courts or in the field of the psychiatric service available to the state. This feature, among others, was discussed by Judge James T. Brand in the *Oregon Law Review* in 1930,[34]—the comment being made that Massachusetts is of insignificant area, of dense population, and of great wealth, as contrasted with Oregon, so that the unit cost of the administration of a similar law would be much greater in Oregon than in Massachusetts. The area of Oregon, for example, is approximately twelve times that of Massachusetts, whereas the population is less than one-fourth that of the latter state. Judge Brand might have added that there are only two state hospitals in the entire State of Oregon, as against sixteen in Massachusetts—so that it can readily be agreed that the situations are not comparable. It is evident that for the

[32] See, for a general discussion, WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933) 401-407; GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1923) 55-56, 58-72, 474-476.

[33] See Report of Committee (July, 1935) 26 J. CRIM. L. & CRIMIN. 290; see also WIGMORE, EVIDENCE (2d. ed. Supp. 1934) §563, p. 284.

[34] Brand, *The Insanity Defense* (1930) 9 ORE. L. REV. 309.

proper functioning of a statute like the Briggs Law there must first of all be available competent psychiatrists in adequate numbers, and that the state hospital service would normally be expected to furnish at least the nucleus of the psychiatrists required for the operation of a law of this type. There are certain other prerequisites as well which might be enumerated as follows: a well developed central organization of the state hospitals, operated on an efficiency rather than a political basis and possessing the confidence of the public and of the courts; the existence of a central record system for the courts, so that the previous record of a defendant may readily be ascertained; still another consideration, more intangible but perhaps more important, would be a widespread public interest in the welfare of the mentally ill, and a readiness of the courts and prosecutors to take an interest in the proper disposition of those defendants who are found to be abnormal mentally. Of equal importance would be the existence of an individual, or of a group inspired by an individual, who would take the initiative not only in securing the enactment of the law, but in stimulating and encouraging its effective administration. Massachusetts is extremely fortunate in having all of these. However, not *all* of the prerequisites, at least, can be said to be lacking elsewhere, and it seems inevitable that the Briggs Law should continue to be an inspiration to other states to enact legislation at least modeled upon it if not identical with it. The scheme in general is adaptable to other states, although certain modifications would have to be made in some instances, dependent upon the local administrative organization. Experience has shown that no law is self-enacting or self-administering, and if the history of any statute is closely studied, the imprint of a personality can almost always be found as the *raison d'etre* of the law and of its efficiency. The Briggs Law was the result of much thought, effort and initiative on the part of its author. Massachusetts may properly consider itself fortunate in having led the way to a closer union of psychiatry and the criminal law under the banner of the statute which has just been described.

PSYCHIATRIC TESTIMONY IN PROBATE PROCEEDINGS

HAROLD S. HULBERT*

INTRODUCTION

Probate judges and other trial judges who have heard will contests, and appellate judges and supreme court judges who have reviewed such suits tell us two things: one is that psychiatric testimony or interpretation of the mental status and competency of the testator is more necessary in will contests than is generally recognized; the other is that having a psychiatric witness in court is not an unmixed blessing.

To turn to the first of these observations, there are some judges who have come to believe that there should and must be expert neuropsychiatric testimony in all cases where there is lay evidence, needing interpretation, as to the testator's mental incompetence. How this may best be achieved will require a generation of study and experimental application, and will require statutory enactments as well as growth in common law through broad decisions. Its evolution must be toward the expeditious, simple, and economical; the courts and courtrooms are so busy that simplicity and economy of time are veritable essentials. Courts are conducting a business of settling differences practically; practicability has eclipsed the abstract ideal of true and perfect justice in all its ramifications.

In essence, the psychiatrist needs much more truth in evidence presented for his interpretation.

The experts have both capabilities and limitations. The layman recognizes that not only is the psychiatrist the best informed in the nature of normal and of abnormal human nature, of mental abilities and of mental disabilities, of brain function and of brain disease, but he also recognizes that because the psychiatrist is accustomed to draw reliable conclusions from few data—*e.g.* spinal fluid cells as counted, unequal pupils and absent knee jerks, different types of memory disorder, inequality of the two sides of the face or of the reflexes of the two sides of the body, or from a confused mind or even a mind in stupor—that if the psychiatrist as expert witness is furnished a sampling of data of the functions of the mind of a deceased testator he is able to

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make a reliable diagnosis which will be of valid and valuable help to the court and jury in a will contest.

Although no analogy is perfect, the comparison most commonly used is with a paleontologist, who can reconstruct an estimate of an animal, even prehistoric, if given a few typical bones such as skull, hip bone, a vertebra or two, maybe a rib and a bone or two of an extremity. Of course he could do better, much better, in reconstruction and estimate if given the entire skeleton or most of it. But if given some miscellaneous bones of the creature under study mingled with some other bones of other animals, say, of a strayed and bogged cow and part of an ossified, petrified paw of a turtle, he could not make a reconstruction which had the marks of verisimilitude. So with a psychiatrist as an expert witness in a will contest. He can in almost every case evolve a true and correct opinion from even fragmentary evidence, if those fragments are true and not false. But he is handicapped in a unique way, in that he is denied the right which the jury enjoys as one of its rights, namely, the right to reject the inconsistent as false. He rarely can evolve a true diagnostic opinion when he is offered fragments which are a bad mixture of truth, half-truth, and of false and even wilfully misleading evidence.

The expert looks to the judge as the authority on truth. What the judge permits he accepts as truth. He knows that the lawyers are partisans and combatants, that they do not combine to present all the truth but that each presents just certain truths or certain aspects of the truth. He neither approves nor disapproves of their efforts, for their technique is not his. He wants the word factory to turn out U. S. P. truth, and how it is done is not his affair. He looks to the judge to put on the stamp of approval, just as he looks for the label "Accepted, American Medical Association" on the bottles whose contents he uses in private practice. He does not care how the finished product is presented, in pills or liquids, in direct questions or in hypothetical questions, so long as he knows it is all true and verified and no extraneous matter is included.

In making the second point—that having a psychiatric expert witness in court is not an unmixed blessing—the judges explain that, though he may clarify the main situation, yet, as a by-product of his language and cumbersome psychiatric definitions and because of his demands and the *modus operandi* of handling him, there is created a constellation of lesser, complicated problems. No one has asked the psychiatrist his opinion how two sets of lawyers and one judge and one jury of assorted minds complicate the psychiatry of interpreting the mind of a deceased testator.

It may be safely concluded that the use, misuse, and limitations imposed on psychiatric interpretation and opinion are more generally unsatisfactory than is generally realized.

Nevertheless, in those will contests where the competency of the testator is a disputed point, or the testator's susceptibility to undue influence is in issue, the aid of a psychiatrist, used strictly within the legal rules designed for lay witnesses, is the

best method evolved to date. I maintain that the present system is a good system and works out so that truth and justice predominate in over 50 per cent of the cases where a psychiatric witness is used in will contests. "Over 50 per cent" leaves room for improvement. This is not scolding nor fault finding: it is an observation to be taken for what it is worth. The "rooms" for improvement include the statutes, common law and decisions of higher courts, the rules of court procedure, the judge, the two attorneys, the jury, the witnesses, and the non-testifying interested parties, as well as the expert witnesses. Each person in the courtroom has a hard job, faces many obstacles, and is bound to slur somewhat. All travel toward the same goal or destination, but by different roads. Hence there are apparently irreconcilable differences en route.

THE HUMAN FACTOR

Law writers and others of the bench and bar seem almost apologetic in discussing this topic of the application of psychiatry in court. There is no need for any lawyer to have an inferiority complex attitude toward the inability of the law in action to make proper use of that vital and great domain of human knowledge technically known as psychiatric knowledge of human nature. On the contrary, the law itself and legal practice earn new laurels as complicated cases come to trial and are adjudicated; unfortunately those laurels are not bestowed, because of the erroneous philosophy that "virtue is its own reward" and only error is news deserving comment. The law and law-in-action are admirable. They also are incomplete, therefore imperfect.

Psychiatry and psychiatrists under court rules are not at fault. No branch of medicine has made as great advances since 1900 as has psychiatry! No branch of medicine has as many real sick to attend every day as have the psychiatrists. Yet psychiatry, it must be admitted, does not do well in court. That is partly because psychiatric knowledge is incomplete, and largely because the 80 per cent of psychiatric knowledge which is non-technical and which might be understood by any open-minded, intelligent man, if explained to him, has heretofore been too cloistered. It has not been "retailed to the consumer" or inculcated in the minds of men generally, including men who may appear in court in some rôle, *e.g.*, judge, attorney, juryman, etc.

The reason the technical part of a will contest is not appreciated and treated with dignity or presented or handled well is the same reason that there are will contests, namely, *the human factor.* Many witnesses are liars or deliberately tell half truths only, many lawyers try to exclude the truth or part of the truth, many persons involved in the will contests are cheats, and many judges do not ascertain the whole truth but for one reason or another (satisfactory to themselves) exclude it in part. That last statement needs immediate explanation: many judges follow rules whereby they are obliged to exclude part of the truth. Other judges pre-judge, then drowse. Jurymen too. First impressionists! Their receptivity is poor. The contesting law-

yers admittedly pre-judge but do not drowse. Witnesses too. A courtroom during a will contest is, unconsciously, a psychiatric clinic, too bereft of excellence, and certainly not an example of a unanimous quest for "the truth, the whole truth, and nothing but the truth." Yet that is the unconscious motto of every psychiatrist, more than it is of any man of any other discipline.

The main fault, however, lies in the laymen who testify or who knew of the testator yet do not testify.

Hidden witnesses and excluded witnesses are not confined to criminal trials. In will contests, of course, there are many simple people who knew the testator but who do not know how to talk on the stand: they draw inferences instead of telling facts. While on the witness stand, if they are put on at all, they are treated harshly, abruptly ordered—rudely, I'd call it—and not helped. Gold is where you find it; with patience, skill, and proper handling gold may be extracted from low grade ore. Much of value in evidence may be gleaned from persons who are not facile of speech or who are not alert in apperception. Trial court judges who lack skill and patience do poorly here, and do not control the lawyer of the opposing side. A judge should assist the stumbling, elderly witnesses so often encountered in will contests. Often attorneys are reluctant to put some witnesses on the stand, fearing that they may do poorly and ramble rather than answer. I maintain that the judge should, like an inquiring magistrate, hunt up such witnesses and from them draw out those facts which would help to clarify the vague concept the court and jury have of the testator.

Where a witness recounts conversations of the testator, his testimony should be subjected to great scrutiny, for the witness and "his side" may be vastly interested in the outcome of the contest, but where he recalls habits, customs, appearances, and things which others who knew the testator could describe, then his evidence is more credible. In other words, there is a great deal of secondary evidence which might be sought and presented, under the rules of evidence, which would be useful if patiently elicited.

Under the human factor, it must not be overlooked that there are sometimes some experts who are wilful liars, and others who through devotion to the cause of one party are as lopsided as any other paranoids. Of these, anon. Theoretically the psychiatrist is not interested in the outcome of the case. In practice often a trial attorney regards the psychiatrist whom he puts on the stand as a salesman, really as another lawyer, as one hired to support his case as far as his medical ethics and personal conscience will permit him. Combinations of such lawyers and experts do not wear well and not only mire themselves in time and with repetition but are mired in the eyes of the public. Of course an expert, especially where there are opposing experts, may not be believed by the jury, no matter what he says or refrains from saying, for credibility is not highly correlated to his knowledge or to truth. Therefore the psychiatrist really does not invade the province of the jury, for, though

he gives a direct opinion, the jury decides if that opinion is right or is to be rejected in discharging its duty of establishing the fact that the testator was or was not competent. Nevertheless, the more evidence there is offered to psychiatrists, the closer together are their opinions, if these are not biased.

INADEQUACY OF THE EVIDENCE

It is almost axiomatic that in will contests the evidence is but fragmentary, and is necessarily small because of the rules of evidence evolved to exclude what probably would be irrelevant. It is so much the more important that all available truth be elicited.

Two reasonable methods come to mind. One is to have all the factual evidence of *both* sides put in before either side presents its psychiatric expert testimony. Or, in other words, the experts should appear in chief, but only after the lay witnesses of both sides have testified.

The other method has been described by Stephens and Hulbert in the *Illinois Law Review* for November, 1930,[1] in a conjoint paper entitled "Probate Psychiatry," in which a rather detailed description was offered of a procedure of having a psychiatrist examine the testator fully, psychiatrically, the day the will was executed, and of having the psychiatrist be one of the subscribing witnesses and thus eligible to testify later if the will was contested,[2] and, as Probate Judge Henry Horner suggested, to have the psychiatrist file his data and notes in his books in the regular order of his business so that if he too died before the will was contested the data and notes without opinion could be read *in extenso* to a living psychiatric witness for his opinion. This has been done by some wealthy testators who have already been through a few battles of the campaign well known as "a family fight"; but knowledge of the existence of these data and notes has to date aborted any tendency to attack wills so supported on grounds of incompetency or of susceptibility to undue influence, or of forgery.

To probate a will while the testator lives, as occasionally has been proposed,[3] is one thing, and has considerable merit. To examine psychiatrically the testator when he executes his will, or executes the last codicil, is another matter, and has its own distinctive merits, it is believed.

[1] Stephens, *Probate Psychiatry—Examination of Testamentary Capacity by Psychiatrist as a Subscribing Witness* (1930) 25 ILL. L. REV. 276; Hulbert, *Probate Psychiatry—A Neuro-Psychiatric Examination of Testator from the Psychiatric Viewpoint, id.* at 288.

[2] The subscribing witness must and should take every means necessary to satisfy himself as to the mental competency of the testator. See Jones v. Collins, 94 Md. 403, 51 Atl. 398 (1902): "The subscribing witness is presumed to investigate the testator's mentality" and *In re* Miller's Will, 3 Boyce (Del.) 477, 85 Atl. 803 (1912): "The court instructs the jury that the value of the opinion of a subscribing witness, like that of other witnesses, depends upon the opportunity the witness had to observe and judge the testator's mental condition and capacity at the time the will was executed, and upon his use of such opportunity."

[3] For proposals for *ante mortem* probate of wills, see Report of Special Committee on Uniform Act to Establish Wills before Death of Testator, PROC. NAT. CONF. COMM. ON UNIFORM STATE LAWS FOR 1932, p. 463; Cavers, *Ante Mortem Probate: An Essay in Preventive Law* (1934) 1 UNIV. OF CHI. L. REV. 440; Kutscher, *Living Probate* (1935) 21 A. B. A. J. 427.

To prevent murder to make impossible a probable or threatened change in the will, and to prevent isolation on the one hand or undue influence on the other, there is merit in the proposition that when a will is drawn by an attorney (a) there should be present an attorney of some other firm of attorneys and also a psychiatrist, and (b) the will be filed privately with the attorney as an officer of the court and not be filed publicly, as some of these proposals contemplate, where interested, embittered, or solicitous relatives and others may see it while the testator lives. The whole question of *ante mortem* probate needs legislative study, enactment and trial, but *ad interim* there already are methods a testator can use to insure that his last testament will be executed as he desires.

MORE POWER TO THE JUDGE

In order that psychiatric interpretation may be of truly great value, more truth must be elicited before the data are propounded to the psychiatrist for his interpretation and opinion. The most practical way to do that is to grant more power to the judge. At once it is realized that the decentralists will object to endowing judges with more power than they already have. For a moment let us consider their "cons" and later the "pros."

Contra: Judges have lots of power now, but they do not use it with enough application. Power should not be vested in any man unless there be arrangements for appeal and yet higher appeal. Judges are too human, hence frail. Judges are too removed from contact with ordinary men and their needs and necessary reactions in life (*e.g.*, an appellate judge who never drove an automobile passing on cases of men driving hastily to work and not stopping before each track of a multiple railroad crossing). Voters (*e.g.*, labor) hate appointed judges, though they be fair, and want responsive, young, "ungrooved" judges. A judge who does try to "try the case before him" is unpopular with the lawyers, but at least they know what to do because they know where he stands. Half the litigants and their friends leave a lawsuit hating a judge, unless he has been aloof and let the lawyers try the case without interference unless and until called upon to pass on some question of law. Judges of trial courts in more and more states (here in the old Northwest territory, the region known to this author) already have the power to comment on witnesses and on the evidence, but are fearful of using that power lest it impair their chances of re-election.

Pro: People trust judges, and judges have demonstrated as a body (with some or many exceptions, it is true) that they are worthy of the trust of the people. On appeals, at least three judges sit together; on appeals to the highest appellate courts, five, seven and nine sit together. The world has known of at least five types of prisoners, all having been judged: civil, including criminals who have been tried for breaking the civil law, political prisoners, religious prisoners, military prisoners

and personal prisoners.[4] In the United States we now only have type one, *i.e.*, civil (criminal) prisoners. We rarely have type four, war or court martial under martial law prisoners, and in those cases we deeply prefer to have them tried or passed upon by elected civil judges. Ancient and modern history abroad indicates that there is a tendency by ruling minorities to have the other types, especially political and religious prisoners. What is "just around the corner for us in the United States" does not worry common Americans as long as we have trust in empowered and powerful judges.

Yes, we demand a strong judiciary. In will contests, too, the judge should be empowered and required to interrogate lay witnesses and get the full truth, not half truths. He should be able to summon witnesses. He should punish liars with contempt of court, or inaugurate contempt of court or other proceedings for perjury without delaying the progress of the case on trial. He should remove false witnesses from the stand on his own motion without waiting to hear an objection. It would be better to exclude obvious lies from the evidence and thus exclude falsities from the hypothetical question than to admit them and also admit evidence from the other side to refute them: the latter method is rather practical for jury consideration, but the inconsistencies make the evidence impractical as premises for a hypothetical question. He also should punish with contempt of court quack psychiatrists and paranoid biased "experts." In our language he should be a surgeon as well as be a physician. Fundamentally, he is to control the human factor, and secondarily control court procedure.

A judge at his best neither drowses nor is affected by political affiliations. Some observers might say a judge is never at his best, for he is too busy. Yet, if encouraged, even a most modest judge will react on a high plane. A judge's average best may be made a very high average.

A powerful judge can interpret abstruse psychiatry. The psychiatrist, to do his best, needs a judge with such power actively used.

THE HYPOTHETICAL QUESTION

Its use in practice and its quirks are well known. It is useful! But it is raw as presented. To the jurymen, the hypothetical question is "bad" enough, but, to the jurymen, the hearing of the discussions of it, objections to this and that part of it, its modifications, its restatement by the opposing side, all tend to make ludicrous the issue, the court, the lawyers, the expert, and the parties litigant.

It is here recommended that the hypothetical question be discussed and settled in privacy just as instructions to the jury are discussed and settled in chambers. There is, however, mistrust and suspicion of what may be transpiring in chambers. The Michigan practice on this point is practically ideal: the hypothetical question is debated and polished in open court, jury and witnesses and experts all excluded.

[4] This classification is from a study, unpublished, on the psychology of different types of prisoners, while imprisoned and upon release or rescue.

If the hypothetical question is long, in courtesy and following the mode of preparing instructions, it is typed and submitted in advance to the court and to opposing counsel. The opposing side of course may, for cross examination, prepare, submit, and, when, in chambers or with jury and witnesses excluded, the question or questions have been polished and rendered acceptable, use several hypothetical questions embracing various theories of defense.

But the present practice of misusing the hypothetical question as restatement of the case to re-impress the jury is bad strategy, though good tactics; bad strategy in that it is so unfair and confusing and degrading that it does not clarify the issue nor help achieve justice. Degrading in that the jurymen conclude that a lawyer who cannot prepare an impeccable hypothetical question is "no good" and that the other critical attorney who himself cannot substitute an impeccable hypothetical question is "no good either," and a judge who cannot by force and leadership see that an impeccable hypothetical question is evolved must have "something the matter with him, too." However, a hypothetical question which meets the demands of both lawyers and which really suits an empowered judge may with efficacy be presented to the psychiatric expert witness. We do things better in our hospitals: relatives and friends and tensely waiting expectant fathers are not sitting in the obstetrical delivery room; we do our work in privacy, and then bring to those interested and waiting the end result of our handiwork. The courts, too, can do better than they do do: creating a hypothetical question should be done in private.

The psychiatrist has the right to demand of the law in action that what is presented to him be true and be accepted by both sides as satisfactory. Or, he has the right to demand that *he* be allowed the right to select the truth and not "swallow it whole." That is the essence of this proposal. Restated, either the judge should see to it that the hypothetical question contains only the truth from the witnesses and from the evidence, or the expert witness must see to it that from the hypothetical question he considers only what appears to him to be true. The inconsistencies, as stated, are or may be absurd. Referring to a recent case in which I served as expert, five witnesses stated that the testator weighed 160 to 180 pounds, and one witness testified that the testator weighed 100 pounds (before he died), one attending physician stated that his blood pressure was 200 (m.m. mercury systolic) and the hospital record was that his blood pressure was 100. On cross examination, counsel asked: "Assume further, Doctor, that the hypothetical man weighed 160 to 180 pounds, and assume he weighed 100 pounds, and assume that his blood pressure was 200, and assume it was 100 . . . have you an opinion . . . etc?" The question was intended to be absurd and to make the expert and his answer silly. I interrupted and asked the judge what I was to assume. He replied, "You must assume it all, all as equally true, and delete nothing of the hypothetical question from your mind." I asked him if he could do that, and he replied, "No, but you must." How much better if the

judge had ironed out the phraseology of the hypothetical question and had seen to it that it was a fair presentation.

Or better still, since the question is hypothetical but the subject is actual, why not so say? Say, "There is some evidence tending to prove so . . . and so . . . and so . . .," not "Assume thus . . ., . . . and that. . . ." That is what appellate courts say: "There is evidence tending to prove so . . . and so. . . ." So in the question at the trial, say: "Five witnesses testified that when he was in fair health before his stroke the testator weighed 160 to 180 pounds, and one witness testified that before the testator died he weighed 100 pounds; one attending physician testified that Mr..... had a blood pressure of 200 in 1929, and in the hospital in 1930 the records in evidence showed that his blood pressure was 100."

Would both lawyers say it that way? No. Could the judge insist it be stated fairly and helpfully? Yes. Should the judge do so? The expert demands that the judge see to it that the data be presented truly, fairly and impartially.

An extreme case of absurdity in hypothetical question is quoted in an editorial in the *Journal of Criminal Law and Criminology* for September-October, 1933.[8]

[8] (1933) 24 J. CRIM. L. & CRIMIN. 517. The examination of the witness proceeded as follows:

Q. Now, Doctor, are you familiar with the philosophy of heterogeneous and homogeneous evolution as applied to the science of medicine? A. No.

Q. Did you ever hear of it? A. No.

Q. Do you know whether or not the internal organs reason deductively or inductively? A. That is quack medicine.

Q. That is quack medicine? A. Yes, sir.

Q. Will you answer the question, do you know, or don't you know?

A. The answer is no, I don't know.

Q. You do not know then the philosophy of heterogeneous and homogeneous evolution as applied to the science of medicine? A. No, no.

Q. Assume this, Doctor. Is it true from a scientific basis that one might suffer a twenty-five per cent injury, we will say, by way of identification of the first joint of the thumb, or any finger on their hand, and yet the incapacity might be increased to seventy-five per cent or more, if you would take into consideration the heterogeneous and homogeneous evolution as applied to that particular injury, or to the science of medicine, due to the fact that the particular organs contained within the human body have certain and definite functions when they exist and stand alone as particular organs, and when they work or operate homogeneously, that is similarly and are thrown together for the purpose of keeping body and soul together, have you an opinion whether or no this is scientifically true,—

Atty. S: That is certainly a honey.

Mr. P: Pardon me, I had not finished.

The Witness: The question is if you lose the use of your thumb, can you think within seventy-five per cent of normal?

Mr. P: No, that is not the question at all. Read the question. That is not in it. My question has nothing to do with the mentality as yet. Do not try to make it ridiculous, Doctor.

The Judge: Read the question.

(Last question read.)

Mr. S: You are making it ridiculous. If anybody in Christendom can tell what that question is, I would like to hear their explanation.

The Judge: Let him finish it.

Mr. P: Have you an opinion whether or not this is scientifically true, taking into consideration the entire membrane, in conjunction with the particular joint as mentioned in this question?

Mr. S: Now, have you finished the question?

Mr. P: Yes.

Mr. S: I object to it as absolutely unintelligible.

The Judge: "Objection sustained."

As the Judge said later about that question, "It certainly is a peach."

Under present procedure the judge could not exclude it until it had been propounded and until an objection to it had been raised. The psychiatric expert witness can answer fairly several hypothetical questions based on different concepts or theories of the evidence, but he can not give the answer to a battle. Nor in dignity should he listen to the battle. The judge should assume responsibility here too. He can participate, and he "knows what it is all about."

COMMISSIONS OF EXPERTS?

Dissatisfaction does exist in regard to the differences of opinions of psychiatrists testifying on opposite sides as expert witnesses. Often this dissatisfaction is deserved. There are, or, to be generous, let us say there were, some bad men among psychiatrists who testified often. Bad, not ignorant. Such an one said to me, "When I want to lean and win a case, suppose the patient was a Dementia Praecox and my lawyer did not want to have him proven insane, I'd examine him for General Paralysis. Then I'd tell the jury he did not have fixed pupils nor absent knee jerks nor tremors nor memory defect, etc. See? Not a sign nor symptom of [that] insanity!" Only an alert, incisive, and acting judge could handle such a rascal. The human factor again. He's dead, and is where bad psychiatrists go. I believe such cases are rare among the objectively trained younger psychiatrists, and are not to be found among the best one or two hundred of our older psychiatrists.

Another cause of dissatisfaction is a carry-over from criminal trials. It was once generally though ignorantly believed that any doctor who testified "for" a criminal and "agin the gove'ment" was a consort of criminals, a criminal "doc" himself, a morphine addict, an abortionist, etc., whereas a doctor who testified against the criminal was sanctified, was of course telling the truth or if he wasn't he was an upright man helping to hang the wicked. Yet no one would ask a court stenographer to do her best to hang the wicked by deleting from the records what the defense witnesses said. Nor do we want a judge with one deaf ear. Nor should we want a doctor who saw only through the eyes of a politician, temporarily prosecuting attorney. Some experts are still too susceptible, and others are damned because the side who sought their counsel is the unpopular side, be it in criminal trials or in civil proceedings such as will contests. Public sentiment will take attitudes and newspapers will continue to use young reporters who contribute unwittingly to the immaturity of public opinion. Only judges may be expected to have the old-age philosophy of accepting human frailty.

The third cause of dissatisfaction is because, in private practice, doctors agree in public. In public! In their own circles they may, and if equals, usually do disagree with each other. But the consensus of opinion is presented to the public, to the relatives for example, as a unanimous opinion. That works best for the welfare of the sick.

So in public, as in a trial, when doctors do disagree, it comes as an unwelcome

shock. No one likes it, judges, lawyers, jurymen, parties litigant or interested, nor the public. Nor do the doctors as a group nor the doctors called into the law suit.

The trend right now is not toward the time tried method of letting the court and jury decide disputed points, but to have a commission. The prototype is, naturally, the old method in medicine, of calling in *a* consultant. Note the word "a"—*a* consultant. If we called in nine consultants, they might divide five to four.

So, let us have a commission. Let the judge or appointed state officials appoint a neutral doctor. Politics or statecraft will determine who he is to be, and, we may say sarcastically, being appointed by the judge or the state house crowd will make him, *pro tem* at least, a super-doctor and a super-man. Anyway, he will be as neutral as the judge is who is elected and to be re-elected or is appointed by someone who was elected and to be re-elected—maybe.

Such a train of thought may or may not have merit in will contests.

Let us see how it does work out in two other types of law suits. In workmen's compensation and negligence cases, because of the great risk of malingering or of exaggeration or compensation neurosis, the human factor may cause the plaintiff to react to the tendency or impulse to be abnormal; consequently it would be well to have present at any medical examination by the doctor of each side a doctor representing the state board for workmen's compensation, to act as a referee as to medical findings, but without opinion. In will contests there is no parallel. The testator does not think of malingering, nor is a contest of his will often contemplated by a testator; hence no referee of medical facts can be had.

Let us see how it works out in criminal cases. No man can prove that he himself is insane. Therefore three psychiatric examinations are in order, but each independent of the others. One by the prosecution's psychiatrists, and their medical findings, *e.g.*, that the defendant does not have paresis, should be reported only to the prosecution and may be used by the prosecution. One by the defense, and the medical findings, *e.g.*, that the defendant has epilepsy and epileptic equivalents, should be reported only to the defense attorneys to be a basis for their theory of the defense. The third by the court's examiner and advisor, to safeguard the court in protecting the state in the future. All objective data of each of the two sides, Wassermann, spinal fluid findings, x-rays, etc., are to be furnished to the court's examiner. He is to help the judge. His views on the question of probation or minimum or maximum sentence may be consulted.

In will contests there is no parallel. The testator was an amateur testator, not an habitual criminal—I mean testator—nor a consorter with other testators. Nor does the testator contemplate malingering or evasion.

There is neither room nor need for a court-appointed expert or commission in will contests. An *amicus curiae,* an interpreter to the judge lest he make mistakes, is always in order. Of course. But not a super-expert on facts for the jury. The jury are the super-experts on facts.

From what has been said and indicated above, there appears to be a very real need of separating the false from the true. No better method of achieving this end is known than that of cross-examining experts, provided the experts had first been given all the truth available and which might be elicited. Cross-examination under such circumstances, and also examination by an empowered judge, would be welcomed by every high minded, competent psychiatrist. Cross-examination is the only antidote for sanctimonious paranoid "experts" who rely on prestige and the invocation of moral issues to give them impressiveness or increase their impressiveness. Cross-examination is better than any commission. The human factor must be made manifest and be differentiated from the scientific factors.

CONCLUSION

1. The human factor is the greatest complication in will contests, much greater than the complications of technical psychiatry. There is more perjury and half truths told by lay witnesses in will contests than in any other kind of law suit.

2. As a basis for psychiatric interpretation and opinion, more truth, more evidence is needed. An actively participating judge may bring out more truth, more relevant evidence. More truth. More power to the judge.

3. When the courts do better, as they can in their province and by natural extension of existing legal machinery, the psychiatrists can do better in the province where psychiatry and the law-in-action overlap. With improved court procedure, psychiatry will rise to the challenge. Both law and medicine are intelligent disciplines, and that their liaison may be more satisfactory each should improve itself and not try to improve each other.

4. Psychiatry does, and always will do, as well as permitted, considering the legal circumstances, considering the mixture of truth, fractions of truth and misleading untruth, and considering the human factor.

5. Either the judge must see to it that the data be presented truly, fairly and impartially in the hypothetical question propounded to the psychiatric expert witness for his opinion and interpretation, or else the judge should elicit all the possible secondary evidence and the expert should be allowed considerable latitude in rejecting inconsistencies and in weighting evidence which is confirmed by other evidence. The jury retains the right to accept the expert's opinion as right and true or to reject it as false and untrue.

6. The hypothetical question should be prepared in chambers or in court with jury and witnesses excluded before being propounded to the expert psychiatric witness.

7. More intelligent and more thorough cross-examinations of lay witnesses as well as of expert witnesses are indicated and needed in matters as highly involved as psychiatric interpretations of a deceased testator.

8. In will contests a court-appointed commission of experts is not a remedy, for the jury is the expert on fact. An *amicus curiae* to advise the judge and to interpret psychiatric findings to him, but not to the jury, is in order.

9. Unanimity of opinion among experts is not to be expected.

10. Psychiatric examination of the testator when he executes a will or codicil will settle in advance many issues which otherwise might be raised in the trial and poorly or incompletely handled.

THE QUALIFICATION OF PSYCHIATRISTS AS EXPERTS IN LEGAL PROCEEDINGS

ISRAEL STRAUSS*

On November 1, 1928, the Honorable Benjamin N. Cardozo, then the Chief Judge of the Court of Appeals of New York State, addressed the New York Academy of Medicine on "What Medicine Can Do For Law." In this address he pointed to the unsatisfactory distinction in the law of homicide, between murder in the first and second degrees, especially the rôle which premeditation is supposed to play in distinguishing these two degrees of homicide. In regard to this he stated, "The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death." He also dwelt upon the law defining and governing mental irresponsibility, which is based in our state upon the formula adopted in *M'Naghten's Case,* and he referred to the principle that morbid propensity or irresistible impulse is not to be considered as a defense. Later in his talk he said, "Everyone concedes that the present definition of insanity has little relation to the truths of mental life."

In an attempt to see what could be done towards remedying these conditions the Bar Association of the City of New York appointed a committee. At the same time, upon request from the Bar Association, a committee was formed by the New York Academy of Medicine. Members of the faculty of the Columbia School of Law were also invited to participate in the conferences. The Carnegie Foundation provided funds to assist in this endeavor. These committees held a number of meetings but found that it was practically impossible at this time to bring about a change in the definition of legal responsibility in this state or upset the definition of premeditation, as laid down in the opinions of the New York Court of Appeals, or to change the attitude of the law regarding morbid propensity and irresistible impulse.

The committees decided that to bring about changes of this kind meant a long period of education, not only of the legal profession but of the public as well. It was

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finally agreed that while the substance of the law itself could not be changed a change in procedure might be brought about, through which the services of psychiatry could be utilized in the practice and application of the law and its procedure as it exists. It was then decided that a survey be made of lunacy commissions in criminal cases, in one of our large cities covering a period of five years from 1926 to 1930 inclusive, in order to ascertain in how many of these commissions the services of a psychiatrist had been used.

These commissions are appointed under the authority of Section 658 of the New York Code of Criminal Procedure which provides that "when a defendant pleads insanity . . . the court in which the indictment is pending, instead of proceeding with the trial of the indictment, may appoint a commission of not more than three disinterested persons, to examine him and report to the court as to his sanity at the time of the commission of the crime."[1] Although the statute does not expressly so provide, it has been held also to authorize the commission to report on the capacity of the defendant to stand trial. Where the defendant is found sane both at the time of the offense and at the time of trial, the court proceeds to the trial of the indictment. Where he is found sane at the time of the trial but insane at the time of the offense, he must be tried nonetheless but the report is available for guidance of the court and of counsel for both prosecution and defense and, if the defendant is destitute, may furnish a basis for the employment of experts by him at the expense of the state. Where the defendant is found insane at the time of trial, provision is made for his commitment until recovery.[2]

The importance of this statute in the administration of criminal justice in New York State can readily be appreciated.[3] The importance of the personnel of these

[1] The second paragraph of that section specifies the procedure to be followed by the commission as follows:

"The commission must summarily proceed to make their examination. Before commencing they must take the oath prescribed in the Code of Civil Procedure, to be taken by referees. They must be attended by the district attorney of the county, and may call and examine witnesses and compel their attendance. The counsel of the defendant may take part in the proceedings. When the commissioners have concluded their examination they must forthwith report the facts to the court with their opinion thereon."

[2] For an interpretation of Section 658 and the succeeding provisions relating to the effect of lunacy commissions' reports, see People v. Whitman, 149 Misc. 159, 266 N. Y. Supp. 844 (1933).

[3] Section 658 is not, however, the only provision in the New York statutes providing for examination of the mental condition of accused persons. Section 836 of the Code of Criminal Procedure provides separate procedures for the examination of persons accused of misdemeanors and felonies respectively. Both contemplate commitment of the defendant by the judge to a state hospital for examination and report, but, where a felony is charged, provision is made for further examination by "two physicians, who shall have had at least five years experience in actual practice, at least one of whom shall be a qualified psychiatrist as provided by law." Since no law as yet provides the qualifications of psychiatrists, this last clause remains an empty gesture.

Two other procedures are also provided by statute. Section 31 of the Judiciary Law, N. Y. CONS. LAWS (Cahill, 1930) c. 31, provides "in a criminal action . . . in which the soundness of mind of a person is in issue," the judge may appoint "not more than three disinterested competent physicians" to examine such person. Section 125 of the Mental Hygiene Law, *id.*, c. 36a, provides for the examination, by order of the judge, before or after trial, of any person alleged to be mentally defective, as distinguished from insane, by "two qualified examiners or a qualified examiner and a qualified psychologist." A physician who has practiced for at least three years "shall be and become a qualified examiner." A per-

commissions—"not more than three disinterested persons"—is equally evident. The courts in actual practice have generally appointed a lawyer, a physician, and a layman; occasionally two lawyers or two laymen.

Consent for such a survey was obtained from the judges of the courts. In fact the judges have supported every movement made by the joint committees to improve the present situation covering criminal code procedure. The result of this survey is not to be regarded as casting any reflection on any of these judges in the choice of physicians, for the reason that they did not have at their disposal a list of qualified psychiatrists but were compelled to use the services of physicians who were recommended to them or were known to them personally.

The survey revealed that in the course of five years 14,982 felonies and 6,808 misdemeanors were tried. It was also found that 792 lunacy commissions and examiners in mental defect[4] were appointed. Of the 792 prisoners examined, psychiatric conditions were noted in 517 cases. The appointment of these various commissions required the services of physicians on 1050 occasions. The number of men qualified in psychiatry appointed on these commissions totalled 16, and these men served on 62 occasions. On a percentage basis, qualified psychiatrists served on 6 per cent of the cases in which this court had to appoint physicians for a psychiatric opinion.

The qualifications of the physicians appointed by the court were determined by reference to the medical directory, wherein a short autobiography of physicians is recorded, the doctor designating his own hospital affiliations and the branch of medicine he practices. As a result of such an investigation it was found that there were appointed physicians specializing in internal medicine 15; surgery 15; gynecology 5; urology 4; pediatrics 6; ear, nose and throat 5; pathology 3; public health 3; obstetrics 1; hematology 1; orthopedics 1; proctology 2; dermatology 2, and neuropsychiatry 16.

Although these men were physicians in good standing and specialists in various branches of medicine, they did not designate themselves as psychiatrists, and were not qualified to give expert opinion, by either training or experience, on the mental status of the prisoners.

In order to remedy this situation, a bill has been introduced in the New York State legislature for the past three years which provides a procedure for the licensing by the state of "qualified psychiatrists." To insure the utilization of the services of

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son having two years postgraduate study in psychology at a university or college and three years of "actual clinical experience . . . shall be and become a qualified psychologist." *Id.* §19.

A number of other statutory provisions relate to the examination of mental condition of convicts. For the text of these and the above statutes, see New York State Law Revision Commission, *Recommendations and Study made in relation to the Proposals of the Medical Jurisprudence Committee of the New York Academy of Medicine* (1935) N. Y. LEGIS. DOC. No. 60 (L).

[4] Examination of alleged mental defectives is provided for by Section 125 of the Mental Hygiene Law, discussed *supra* note 3. Any physician in practice for three years may be certified as a "qualified examiner" under Section 19 of this law.

psychiatrists so qualified, a companion bill has been introduced amending Section 658 of the Code of Criminal Procedure, so that the composition of a lunacy commission shall consist of a lawyer and a qualified psychiatrist, the third member not being designated in a specific manner, but left to the discretion of the judge appointing the commission.[5]

The first bill[6] provides for the creation in the department of mental hygiene of a board of psychiatric examiners "to consist of the state commissioner of mental hygiene, the head of the department of psychiatry or of neurology and psychiatry of a medical college in New York State who shall be appointed by the state commissioner of education, the state commissioner of correction and a physician selected by the council of the Medical Society of the State of New York. The state commissioner of mental hygiene may delegate an assistant commissioner of his department, and the commissioner of correction may delegate a competent psychiatrist of his department to appear and exercise their respective powers and duties at any meeting of the board."

The members of the board thus created are to receive no compensation but are to be reimbursed for their actual expenses. The board is given power to make necessary rules and regulations.

Authority is conferred on the board to give certificates as qualified psychiatrists to persons meeting the conditions prescribed in the statute as follows:

"No person shall receive a certificate unless

"(1) he is a physician duly licensed to practice in the state of New York and has had at least five years' experience in actual practice; and

"(2) either (a) has had three years' full time practice since January first, nineteen hundred fifteen, in the care and treatment of persons suffering from nervous and mental diseases or mental defects in an institution providing for the care of such persons and having accommodations for at least fifty such patients, or

"(b) has devoted the five years immediately prior to filing his application for certification to a practice confined wholly or substantially to the care and treatment of persons suffering from nervous and mental diseases or mental defects; and

"(c) shall fulfill such additional requirements as may be established by the board from time to time to insure the competency of such person to act as a psychiatrist in any action or proceeding in which by any provision of law the services of a psychiatrist holding a certificate from the board are required."

The bill further provides that the department shall keep a record of the persons so certified and publish a list of such persons annually. Disciplinary powers over

[5] This bill undertakes an extensive revision not only of Section 658 but also of the succeeding sections relating to the procedure to be followed upon the rendition of the commission's report. For the text of this bill and a discussion of the proposals contained in both bills, see New York State Law Revision Commission, *supra* note 3.

As has been pointed out, *supra* note 3, Section 836 of the Code Criminal Procedure already provides for examination by a "qualified psychiatrist as provided by law" although no law as yet provides the qualifications of psychiatrists.

[6] N. Y. Assembly Bill Int. No. 784 (1933), providing for the insertion of a new section 27 in chapter 27, article 2, of the consolidated laws of New York.

those certified is vested in the board by the concluding provision which reads as follows:

"If the board, after reasonable notice and an opportunity to be heard, finds that a certificate was obtained by misrepresentation or fraud, or is held by a person who is unfit or incompetent from negligence or other cause, to act as a psychiatrist in any action or proceeding in which by any provision of law the services of a certified psychiatrist are required, it may revoke or suspend for a fixed period, such certificate."

The bill for the qualification of experts has been approved by the New York Academy of Medicine, the Bar Association of the City of New York, the New York County Lawyers Association, the judges of the Court of General Sessions, the State Charities Aid Association and the Medical Society of the State of New York. It is the first time that the State Medical Society has agreed to a classification of its membership. Nevertheless, the bill has failed of adoption through opposition, perhaps because of a lack of complete understanding of its importance.

Not only is this measure significant by virtue of its immediate contribution to the problem of securing properly trained personnel for lunacy commissions in criminal cases; it is also likely to have a far-reaching effect on the caliber of expert witnesses employed in criminal and even civil cases where the issue of mental competency is raised. The psychiatrist who meets the standards established by the board will command the respect which his qualifications merit. The testimony of the unqualified "expert" will be accorded scant consideration.

MEDICAL TESTIMONY IN PERSONAL INJURY CASES

FREDERIC E. ELLIOTT* AND RAMSAY SPILLMAN†

I

The journal in which these lines appear carried an advertisement in the issue for June, 1935, of a "Preparation Manual for Accident Cases," for which it was claimed "This is NOT a text book, but a practical manual intended for the practicing attorney—outlining in clear, understandable detail, precisely what steps to take to build up an accident case to its point of MAXIMUM effectiveness." (Capitals by the advertiser.)

Thus, one does not have to go far for evidence that under the legal procedure current today, accident cases are not settled by a dispassionate inquiry into the facts, but instead they are "built up" to their "point of maximum effectiveness."

The news items emanating from the meeting of the American Bar Association in Los Angeles this year lead one to believe that the Bar Association is becoming acutely conscious that public opinion is not entirely friendly toward the legal profession. It might be pointed out that criticism of some of the accepted legal procedure is not anything particularly new. When a graduating class of Harvard Medical School is addressed on its way out into the world, it is usual to select a speaker whose opinions are reasonably representative of the most highly respectable circles of medicine. Dr. J. W. Courtney said to the Harvard graduating class of 1915:[1]

"The present mode of procedure in our courts, in so far as medical testimony is concerned, is not a particularly edifying one. To illustrate this point, let us take, for example, a case of the type which is most commonly met with in everyday work of the courts—an action of tort for personal injuries. In such a case, the plaintiff is practically always of the proletariat class; the defendant, a public service corporation, or an insurance company. The army of witnesses on either side is generally appalling. Of these the medical ones alone concern us. They are of two hostile camps, and prepared to attempt, under solemn oath, to uphold opinions diametrically opposed, yet supposedly derived from a single series of facts and observations.

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[1] This address was published in *The Boston Medical and Surgical Journal*, Jan. 6, 1916.

"The situation is a deplorable one, and nobody discerns the glaring wrong of it all with clearer vision than certain high-minded men from our ranks, who have long striven to procure legislative enactment looking toward the abolition of this evil.

"To me, for many reasons, which I cannot here enumerate, it seems hopeless to expect that legislative appeal on the part of such men will ever be fruitful of the desired results. Hence, it is the bounden duty of every man in the profession so to shape his conduct toward cases which promise to eventuate into court proceedings, that due respect will be given his opinion, that he will not merit the biting sarcasm, the sneers, the raillery and general brow-beating of opposing counsel. And most of all, that through his efforts the ends of justice will really be accomplished."

Dr. Courtney died June 6, 1928 at the age of sixty. It is lamentable that he did not live to see the day when a law journal invited physicians to submit suggestions for a symposium which is heralded by that journal's own statement that "The rules governing the rôle of the expert witness in criminal and civil litigation have long been a source of dissatisfaction to bench, bar, and the scientific professions alike." If these rules are to be continued indefinitely, the writers have no suggestions to make. If the legal profession has come to the point where it really desires to scrap the present procedure and go about the adoption of a proper one, it is our firm belief that the medical profession will spare no effort to coöperate in such a project.

II

Under the hypothetical improved procedure which the writers have in mind, the "building up" of an accident case will be conspicuous by its absence. Cases will not be "built up." They will be settled on a dispassionate examination of the facts, and medical expert witnesses will be the servants of the court alone, not the hirelings of the plaintiff or the defendant. The medical expert witness will be allowed to tell all he knows, regardless of whether it favors or detracts from one side or the other. The final opinions as to liability, nature of injury, and indemnity deserved, will not be left to a lay jury of twelve. Cases will be heard not before a lay jury which may or may not be swayed by the lawyer's bag of emotional tricks, but by a tribunal of two or in some cases three judges. One judge will be a legal judge, to pass on the law and on the liability. The second judge will be a physician, known as a medical judge; not, however, the same thing as the medical referee in New York State Workmen's Compensation procedures, a position often occupied by a non-medical man. The function of the medical judge will not be to judge on law, but on questions as to the causal relationship between the defendant's act and the injury for which plaintiff seeks damages and as to the extent and permanency of the injuries thus caused. The third judge, in cases requiring one, will represent the lay point of view, if the case is one with a particular industrial bearing.

It has been of no little interest to the junior author to learn that a plan, essentially similar to his own, was formulated earlier and independently by no less an authority on the law than Chief Judge Frederick E. Crane of the New York Court of Appeals,

in an address before the Association of the Bar of the City of New York on January 28, 1932.[2] Discussing the delay in obtaining trial, particularly in cases arising out of automobile accidents, he said:

"We find our court calendars frightfully congested. In this county the trial of cases is at least two years behind, and in Kings County, Brooklyn, the calendars are four years behind, in Queens and Nassau counties, three. In the City Court of Brooklyn, which is about six years old, I am informed that it is over five years behind. The lawyers tell me that their clients are obliged to settle their cases at nominal figures because they are unable to wait for litigation. Financial reasons demand a sacrifice of their rights. As likely as not after a verdict a case is carried up on appeal and reversed either by the Appellate Division and the Court of Appeals, and the same procedure starts all over again. . . . The number of automobile accident cases has added materially to the number of the cases upon our calendar. . . . What a speedy disposition there would then be of all these automobile accident cases when the court could appoint arbiters without limit—a lawyer, a doctor, a layman—who would dispose of the case as satisfactorily, yes, more satisfactorily than most of the courts and juries."

The writers, having been asked to contribute their ideas, have felt free to outline their conception of what the ideal arrangement would be, though there is no implication that they expect to see it in operation any time soon. In this connection, it should not be amiss to mention that the address by Judge Crane, to which reference has just been made, was endorsed by the Committee on Economics of the Medical Society of the State of New York, and the Committee recommended that the House of Delegates approve of the principle of compulsory arbitration of automobile accident case claims, and that the secretary of the Society transmit the expressions of their approval to Judge Crane. Mr. L. J. Brosnan, who, as counsel for the New York State Medical Society, defends the members in malpractice cases, questioned this recommendation in the following words:

"Section 149, paragraph A of this report approves the principle of compulsory arbitration in automobile accident cases. This approval is based upon a recommendation by Judge Crane of the Court of Appeals that it would be a desirable thing for the congested calendars to have automobile accident cases decided by a board of arbitration. I desire to point out, however, that if the lawyers who are now handling automobile accident cases on behalf of plaintiffs, are deprived of this business by legislation, they will necessarily invade the field of malpractice on the plaintiff's side. This, I think, should be taken into consideration in determining whether this recommendation of the Medical Economics Committee should be approved."

This is all a matter of public record in the *New York State Journal of Medicine* for April 15 and June 15, 1932. Truly, if it isn't one thing that stands in the way of legal reforms, it's another.

Obstacles to its adoption aside, we are trying to formulate a procedure which will provide a maximum appeal to reason and a minimum appeal to emotion. We are prepared to be entirely cordial to other ideas as to details, provided that they adhere

[2] The address was published in *The New York Law Journal*, Jan. 29, 1932.

to this fundamental principle. We have visualized an individuality which has no strict counterpart in current affairs, namely, the medical judge. This office should be held by a man of sound medical experience and unquestioned integrity. As for the third judge, representing the laity or industry involved, he already is found on arbitration boards which are working today, and it is a matter of record that the idea works out satisfactorily.

The writers are aware that any procedure which dispenses with the jury is likely to present constitutional difficulties, and they do not expect the legal profession to set aside the Constitution. Since a consideration of constitutional problems is without their province, the writers have consulted a member of the New York State Bar for his opinion on this point from which the following statement is quoted.

"In suggesting the removal of all injury cases from courts of general jurisdiction and the creation of specially constituted tribunals for their trial without a jury, your proposal presents constitutional problems of grave difficulty. The federal and state constitutions guarantee the common law right to trial by jury in civil as well as criminal cases. It is true that in civil cases (and, in many states, in most criminal cases) jury trial may be waived, but this requires the consent of the parties. Such studies as have been made of the use of the jury in civil trials indicate that waiver is a common enough phenomenon, but from the standpoint of your inquiry it is significant to note that the jury is seldom waived in negligence cases. Thus, a four-year study in Connecticut showed that although negligence cases tried were only 2.7 times as numerous as contract cases tried, the number of negligence cases tried before juries was 10.5 times as great as the number of contract cases so tried.[8]

"Workmen's compensation laws afford a precedent for the abolition of the common law trial of negligence claims, but they substitute not merely an administrative for a judicial determination of liability but also a plan of compensation for industrial accidents which permits the injured employee to obtain compensation irrespective of the fault of his employer. If a similar scheme of compensation were devised and adopted for automobile injuries, as has often been suggested, then doubtless a tribunal of the sort you propose could constitutionally be utilized for the determination of compensation.

"If no compensation plan accompanied the creation of a special court for personal injury cases, then the privilege of jury trial would have to be retained unless at least the state constitutions were amended. However, the workmen's compensation statutes of some states suggest a compromise solution. They permit employers to stay outside the compensation system and remain subject only to common law liability, but they penalize the employer doing so by depriving him of his most valuable defenses—the fellow-servant rule, assumption of risk, etc. If a tribunal of the sort you have in mind were created as an alternative forum for the trial of personal injury cases and if changes in the law were made to render recourse to jury trial less profitable to plaintiffs, the practical substitution of the former for the latter might be effected. Among the sanctions which might be employed to this end, there might be a drastically shorter statute of limitations and a stringent limitation on the amount of damages similar to that existing in many wrongful death statutes."

[8] See Clark and Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration* (1934) 43 YALE L. J. 867, 871, n. 7.

III

Having given our idea of what would be an ideal procedure, we now offer what it is hoped are feasible suggestions for improvement that do not embody any changes which could not be brought about within a reasonable time.

1. *Whenever negligence resulting in personal injury is the basis of a claim for damages, notice that action will be brought on such claim should be required to be given within a limited number of weeks after the injury, and a preliminary hearing should thereupon be held before a judge or referee wherein testimony of witnesses for the plaintiff as to the facts of the occurrence and the extent of the injury may be taken, subject to cross-examination by defendant's counsel. At the conclusion of this hearing, an order should be made dismissing the complaint if facts sufficient to establish a* prima facie *cause of action are not proffered. If a* prima facie *case is made out, the testimony taken at the hearing may be introduced in the trial of the action on cross-examination or on direct examination to refresh recollection or directly if the witness is dead or has removed from the jurisdiction.*

This proposal is advanced as a means of obviating the absurdities and the well-schooled perjury which arise when witnesses are called upon to recall specific and minute details of incidents from three to five years after their occurrence. We recall an instance of a case in a Kings County Supreme Court which points the need for prompt action in establishing the basis of the plaintiff's case. An automobile had pinched a small boy's foot. The phalanx of one toe had been fractured—no displacement and no deformity. Actually, a minor injury which, if sustained while at play, would have been cause for only slight complaint by the boy. Because of the alleged negligence of the automobile driver, an action was started for $25,000.00 damages, and the boy was transported to and from school and, literally, carried in arms to and from his seat in the school room and his father's car—two trips each day— for six weeks. The trial was delayed by congestion of the calendar and four years had elapsed before the witnesses appeared on the stand.

Just preceding the trial the insurance company offered $250.00 in settlement and the father was ready to accept, but the judge, in protection of the interest of the minor, would not permit its acceptance, saying, "If the injury justified an action for $25,000.00 the sum offered in settlement is not fair to the infant, and if he was not seriously injured the settlement is unfair to the defendant."

Witnesses appeared in succession, the boy, his mother, the father and the family physician. There was agreement between no two of them as to which toe had been injured, there was some disagreement as to which foot had been involved, and only one witness agreed with the details of the bill of particulars. The family physician by chance was the family physician to the presiding judge, and was thereby spared the biting sarcasm which might have been directed very justly to the state of his case record. (Parenthetically, we know that this same physician produced the stub record of a birth after eighteen years—when the Health Department records had

been misplaced or lost.) Through the courtesy of the judge, an adjournment gave opportunity for the physician to refresh his memory by consulting the records of the roentgenologist who had made the x-ray examination and, upon returning to court, he "corrected" his testimony. The jury gave its decision to the defendant.

2. *Eliminate the present contingent fee system and substitute therefor an award to be fixed by the court for the services of the attorney for the plaintiff according to the conditions in each given case. Possibly impose a penalty upon the attorney who brings an action for negligence for which there are no reasonable grounds.*

That the fee system currently in use is a source of scandal and in urgent need of reform is indicated by the following excerpt from the report of Justice Wasservogel at the conclusion of the "ambulance chasing" investigation, over which he presided in New York City in 1928. Justice Wasservogel made the following proposal for change,[4] a recommendation substantially according with that made by Justice Faber after a similar investigation in Brooklyn[5] and with that which the writers propose above.

"I have . . . come to the conclusion that all contingent retainers in actions for personal injuries should be placed under the supervision of the courts, in order adequately to protect claimants in their relations with attorneys, and to eradicate the abuses which have been practiced upon the courts by attorneys. This added burden on the courts is necessary to remedy the situation disclosed by this investigation. I think that most adult personal injury claimants are in the same position as infant claimants when it comes to dealing with attorneys, and require the same protection from the courts. I therefore recommend that section 474 of the Judiciary Law be amended, so as to embrace within its terms the cases of adults who have claims for personal injuries. This will require attorneys, who secure contingent retainers from all such claimants, to apply for an order fixing their compensation."

3. *Develop standards, and secure statutory authorization, for use in the determination of the degree and consequences of personal injuries by reference to the extent of deformity and disfigurement and by the percentage of lost function consequent upon the injury.*

That there is a need for a more accurate method of determining the extent of personal injuries was recognized as early as 1911 by the Washington Supreme Court in a decision[6] upholding that state's workmen's compensation law in which the court said:

"The common-law system of making awards for personal injuries has no such inherent merit as to make a change undesirable. While courts have often said that the question of amount of compensation to be awarded for a personal injury is one peculiarly within the province of the jury to determine, the remark has been induced rather because no better method for solving the problem is afforded by that system, than because of the belief that

[4] See Message of the Governor Transmitting the Final Reports on the Inquiry by the Court into Certain Abuses and Illegal and Improper Practices in Connection with the Administration of Justice, 1929 N. Y. LEGIS. DOC. No. 52, Exhibit A, p. 11.

[5] *Id.*, Exhibit B, p. 37.

[6] State *ex rel*, Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101 (1911).

no better method could be devised. No one knows better than judges of courts of nisi prius and of review that the common-law method of making such awards, even in those instances to which it is applicable, proves in practice, most unsatisfactory. All judges have been witnesses to extravagant awards made for most trivial injuries, and trivial awards made for injuries ruinous in the nature; and perhaps no verdicts of juries are interfered with so often by the courts as verdicts making awards in such cases. *There is no standard of measurement that the court can submit to the jury by which they can determine the amount of the award.* The test of reasonableness means but little to the ordinary jury. Unused as he is generally to witnessing the results of injuries, he is inclined to measure his verdict by the amount of disorder he observes, rather than by the actual amount of disablement the injury has caused. Nor is he aided in this respect by the testimony of medical experts. Conflicting as such testimony usually is, it tends rather to confuse than enlighten him. Perhaps the whole difficulty lies in the fact that the question is too much one of opinion, and not enough of fact. . . ."[7]

Under workmen's compensation laws the need for a "standard of measurement" is equally acute. The problem in this field has already been faced by the Committee on Economics of the Medical Society of the State of New York which, in its Annual Report for 1933,[8] proposed the following procedure for disability determination, a procedure which suggests an approach to the problem of devising analogous standards for personal injury litigation:

"(a). The determination of temporary, partial, total and permanent disability and of the degree or percentage of disability shall be the duty of one or more physicians qualified under the Law, designated or accepted by the commissioner or referee sitting in the case. Said commissioner or referee shall approve or appeal such determination. He has no authority to arbitrarily alter it.

"(b). In the end result after accident the following shall be used as a general guide for determination of degree of permanent disability; three factors are involved;

1. function, or capacity to perform
2. union, or state of repair of parts
3. contour, or external appearance.

"Inasmuch as function is the most important part in any recovery from accident or disease, it should be assigned the highest percentage of value. Its suggested value is placed at 60%.

"Union, or state of repair, naturally has an effect on the ability to perform and also on appearance but can be very imperfect while affording full function and satisfactory appearance. Its suggested valuation is placed at 20%.

"Contour or external appearance, plays an indirect part in ability to perform and in a measure may influence function. Its suggested valuation is placed at 20%. However, if such disability of contour or general appearance is of such character as to reduce future employability its percentage should be increased.

"Illustrative example:

"If in a given case function is only half perfect, allow 30% disability. If union or repair is half perfect, allow 10%. If appearance is three-fourths perfect, allow 5%. The end result, then, is 30 plus 10 plus 5, or 45% disability. Details of evaluation are to be based on "Accidental Injuries" by Kessler, or equally authoritative text.

"Function disturbance may be estimated by this scale regarding the following;

[7] *Id.* at 209, 117 Pac. at 1119. (Italics added.) [8] Par. 18, subdiv. 4.

"Flexion, extension, abduction, adduction, supination, eversion, inversion, apposition, rotation, grip, locomotion, mastication, audition, vision, articulation, sensation, coördination, urination, defecation and other measurable capacity of function."

If a plaintiff were required to specify in his complaint or in a bill of particulars in a personal injury case the extent of deformity, disfigurement and loss of function for which damages were claimed and to calculate the damages claimed with reference to statutory standards analogous to the above, medical testimony in the trial of the action could be specifically directed to the points thus raised and the basis laid for a much more intelligent verdict, especially if the jury were obliged to render the verdict on special issues composed with reference to these factors. Perhaps more important still, the calculation of damages with reference to such standards would afford the trial and appellate courts a far more effective basis for controlling inadequate and excessive verdicts. The requirement of specification would operate as a deterrent to the type of lawyer who can inflate a broken toe into a claim for $25,000.00 damages. An accompanying statutory maximum for damages based on alleged pain and suffering would preclude that element of damage from being resorted to as a means of evading the restrictive effect of the statutory standards.

4. *Limit the testimony of the physician attending the injured party to the statement of facts of his observation and care, except in those cases where circumstances preclude an examination of the injured person by independent experts.*

Why? Because in the majority of negligence cases the payment of the attending physician for medical care is contingent upon the award the plaintiff receives. Therefore, he is a "contingent fee" witness who has an interest in the outcome of the case; and if he does not make out a good case for the plaintiff, the attorney is more liable than not to tell the family that they "had a good case until the doctor queered it."

5. *Limit all expert testimony on medical matters to the opinions of physicians who appear at the trials as the servants of the court, employed and compensated by it, and entirely independent of any interest in the case at issue. Permit parties only to propose to the court the names of experts selected by them from panels of physicians qualified in the various branches of the science of medicine, such panels to be prepared and supervised by the appropriate medical societies.*

It scarcely seems necessary to elaborate upon the desirability of an expert witness being the servant of the court and not of either party to the action pending, beyond referring back to Dr. Courtney's comment quoted in the third paragraph in the present paper. It might be of interest to state that Dr. Courtney had adequate occasion to observe the shortcomings of the existent procedure, because he was an expert in a highly controversial field, namely, neuro-psychiatry.

Naturally, there is need for guidance of the court in the selection of qualified expert medical witnesses. An attempt to meet this need has been made in a recent amendment to the Workmen's Compensation Law of New York:[9]

[9] N. Y. Laws 1935, c. 258, §1, par. 13 (d).

"The physician to conduct such examination shall be designated by the commissioner from a panel of especially qualified physicians submitted to him by the medical society of the county, or any other board acting for any school of medical practice. Additional names for such panel shall be furnished by the society whenever requested by the commissioner and if such request is not complied with in thirty days the industrial commissioner may add thereto names of his own selection."

8. *Experts so chosen should be subject to interrogation only through the court which may utilize appropriate questions submitted to it by counsel.*

This is proposed to obviate "the biting sarcasm, the sneers, the raillery and general brow-beating of opposing counsel" to which Dr. Courtney referred in the address already quoted in this paper. If legal readers take exception to this comment, let them be reminded that, at a hearing before a special meeting of the Medical Society of the County of New York in May, 1934, a very distinguished New York attorney spoke of having defended a physician "in the face of the leers and jeers and sneers of opposing counsel." The wording is not ours; it is the attorney's.[10]

IV

It is our belief that in a very large percentage of the negligence claim cases, in which we have had personal experience, a simple arbitration hearing could have been arranged promptly, and a satisfactory conclusion of the case established to the economy of the tax-paying public (who support the court), the economy of time of the physicians and other witnesses (who are called upon to appear), and to the ultimate betterment of both parties to the litigation, and to their attorneys. If either the plan which we regard as ideal or the proposals which we offer as compromise substitutes therefor were adopted, the number of cases handled by informal arbitration would, undoubtedly, be vastly increased.

It is our further belief that if a procedure embodying the foregoing principles were put into effect, the legal profession would be subject to less embarrassment from such newspaper editorials as, for example, one in the *New York World-Telegram* for September 24, 1935.

"Have you ever been on a witness stand? Have you ever felt the finger of opposing counsel quivering near your face? Have you ever inhaled the hot breath of a booming and accusative voice bellowing at you to answer 'Yes or no'? Have you ever heard it intimated that you were the one who kidnapped Charley Ross, hit Billy Patterson, caused the panic of '93 and brought the yellow fever to Memphis? Well, if you have, you may realize what might occur if a lawyer, always heretofore accustomed to giving it, were suddenly put in a position of taking it, and that he might say things which, in the calm of his study, with all the powers of hindsight brought to bear, didn't look so good. . . . So once again we say we are more than pleased to be magnanimous. To bestow upon Mr. Reed the precious privilege of afterthought, to give him, in fact, *a break that we have*

[10] This subject has been discussed by the junior author in the *American Journal of Surgery* for October 1934, under the title "Suggestions for Improving Medico-legal Court Procedure." (1934) 24 AM. J. OF SURGERY (N. S.) 199.

never seen a lawyer give a witness, to let him express with all due deliberation the very quintessence of what he intended to say."

When, as, and if the principles we have outlined are put into effect, we personally can answer for a number of expert medical witnesses of known integrity who will give freely of their services for the purpose of attempting to further justice, who now flatly decline to appear in court for hire by anybody because the present procedure is distasteful to their sense of fair play and decency.

EXPERT MEDICAL TESTIMONY IN COMPENSATION PROCEEDINGS

RUTH A. YERION*

The use of expert medical testimony in legal proceedings, in both criminal and civil cases, has for many years been the subject of attack and the object of proposed reform. While the brunt of the attack has been borne by the psychiatric expert who testifies on the question of sanity in murder trials, the medical expert called in personal injury actions or the contest of wills has not been free from criticism. Members of the legal profession and the public generally have condemned expert medical testimony because of its partisan character and because it may be bought. A former Chairman of the Committee on Uniform Judicial Procedure of the American Bar Association once said that expert testimony was popularly looked upon as "a safe legal way to buy a verdict."[1] It is also emphasized by members of the bench and bar that since the function of the expert is to guide the jury or the court to a correct conclusion on matters apart from their own knowledge or experience, the issues are clouded rather than clarified where expert testimony is introduced because experts—particularly medical experts—disagree.[2] Members of the medical profession have also criticized the use of expert testimony in legal proceedings, but their protests are directed against what they allege are the inflexible rules of procedure and evidence. They argue that the procedure under which a court trial is conducted wastes their time, interferes with their practice and frequently subjects them to indignities,[3] and that the rules of evidence surrounding the hypothetical question, which is the usual means through which they must put their opinions in the record, tend to obscure rather than to reveal the truth.

It is difficult to say how much of the criticism leveled against expert medical evidence and the method of handling it is justified. By way of extenuation, it is

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[1] Shelton, *Greater Efficacy of the Trial of Civil Cases* (1928) 32 LAW NOTES 45.

[2] See Foster, *Expert Testimony, Prevalent Complaints and Proposed Remedies* (1897) 11 HARV. L. REV. 169; Frazer, *Expert Testimony, Its Abuses and Uses* (1902) 50 AM. L. REG. 87; Morgan, *Expert Medical Testimony* (1928) 21 LAWYER & BANKER 281; Lee, *Expert Testimony* (1933) 1 KANS. CITY L. REV. 8.

[3] Moss, *The Practicing Physician in Court* (1929) 15 A. B. A. J. 497; Anderson, *Expert Testimony, Its Evils* (1929-30) FLA. STATE BAR ASS'N L. J. 18; White, *Judicial versus Administrative Process at the Prosecution State* (1935) 25 J. CRIM. L. & CRIMIN. 851.

urged that medical experts are human beings and human beings will always disagree. In the field of medicine, particularly, there are many and conflicting schools of thought and this gives room for genuine disagreement. It is likely that the specialist, if he is worth his salt, will have developed strong convictions and opinions bearing on his field and that therefore he will be a zealous advocate of those opinions when called upon to testify. It is to be expected, then, that the party to a controversy who needs just those opinions to fortify his case will call that specialist in his behalf. Moreover, the medical expert, like experts in other fields, may have the facts on which his opinion is desired presented to him both before and during trial by an attorney who emphasizes only those most favorable to his client or his theory of the case. The result is that the expert has a one-sided and hence unfair picture before him. In either case, where the expert is called because of his convictions, or where certain facts of the case are omitted or improperly stressed, it cannot truthfully be said that his testimony is dishonest. Despite all these excuses, however, the fact still remains that the testimony of the expert almost invariably favors the side which produces and pays him; and that when both sides produce expert witnesses the jury or the court who must decide the issues is likely to remain in the dark.

The criticisms of the medical fraternity against the lawyer's way of handling expert evidence are also both fair and unfair. It is true that the way in which most court trials are conducted, with all the witnesses summoned to appear on a day certain, does waste the time of the medical expert and keep him from his practice; for it is necessary to lay the groundwork of the case by the evidence of the parties or other lay witnesses before the expert is called to the stand. This means he must be held in readiness, but must wait his turn. He must also, after direct examination, submit to a cross examination which is often gruelling and sometimes, at least to a thin-skinned individual, insulting as well. Yet a severe cross examination may be necessary, for if the expert is not well qualified or if his opinions are biased, it is only through a vigorous cross examination that these facts will be brought to light. If the expert is both able and honest, he need have little fear of the cross examination. As for the hypothetical question, it is true that it is governed by rules of evidence. Summarized briefly,[4] the chief restrictions applied in the majority of states are that the facts assumed in such question must be based on evidence which is not only legally admissible, but which has already been admitted into the record; that these facts must be relevant to the issue and of sufficient detail and completeness to elicit an intelligent opinion. Material and undisputed facts must be included, but where the evidence already introduced is conflicting, the hypothetical question, under the majority rule, need not include all of the evidence but only such part of it as the counsel framing the question may reasonably assume to have been established. The form of the question must be such that the expert witness may answer with a "reasonable degree of certainty" and not by pure speculation, and the answer must

[4] 1 WIGMORE, EVIDENCE (2d ed. 1923) §§672-689; Note (1909) 9 COL. L. REV. 635.

be "yes" or "no." It is the yes or no answer and the rule that the question need not contain all the facts which the opposing side claims to have been proved to which the medical experts mainly object. The evidential rules just outlined do often make the hypothetical question of unwieldy length and detail, as well as misleading. To this the lawyers reply that the expert may be required to state the bases of his opinion and that other hypotheses based on other facts in the record may be put before him. One eminent jurist[5] once said of the hypothetical question that he would not recommend it as a "form of literature," but he argued it was effective in getting at the truth.

If the doctors and the lawyers are at odds on what has caused expert evidence to fall into disrepute, they are in singular unanimity as to the remedy to be applied, namely, that at least one expert witness must be selected by an impartial source, by either the court or other governmental agency or by some non-political body of experts. The cure prescribed points to the cause of the disease which has fallen upon expert testimony; it is not so much its character or method of handling as it is the instrumentality through which it is selected. A few states have already tried different variations of the proposed remedy in both criminal and civil cases,[6] but while the reform has apparently worked well, the idea has been slow in gaining ground. How does the workmen's compensation tribunal deal with the medical expert and his testimony? And do the same criticisms which are made of expert medical testimony in legal proceedings apply when it is introduced at compensation hearings?

It is important first to consider how far legal rules of evidence must be observed under compensation laws. Those of seven states are administered by the courts,[7] in the remaining thirty-nine by administrative commissions. In the majority of the statutes of commission states, and in one court-administered state, Louisiana, there is a provision to the effect either that procedure at compensation hearings must be as simple and summary as reasonably may be, or that the compensation officials in the conduct of hearings shall not be bound by common law or statutory rules of evidence or technical rules of procedure. The wording of these provisions might seem to remove most evidential restrictions from the trial of compensation claims; but the courts have generally held that a compensation award, to be sustained, must be supported by at least some competent legal evidence.[8] There has been, however, one liberalizing effect of these provisions as interpreted by the courts, and that is that hearsay evidence is admissible, although it will not in and of itself, when uncorrob-

[5] Hand, *Historical and Practical Considerations Regarding Expert Testimony* (1901) 15 HARV. L. REV. 40.

[6] See 1 WIGMORE, EVIDENCE (2d ed. 1923) §563, n. 7; Supplement (1934) 281-284.

[7] Those states are Alabama, Louisiana, New Hampshire, New Mexico, Tennessee, Wyoming and Rhode Island. The last mentioned state is sometimes classed with the commission states, since there is a Labor Department as part of the state government; but since disputes may be carried directly to the courts, it is more properly classed with the court-administered jurisdictions. Only two states, Arkansas and Mississippi, are now without compensation statutes.

[8] Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507 (1916), is the leading case on this subject and has been followed in most compensation jurisdictions.

orated by competent legal evidence, be sufficient to uphold an award. This interpretation tends to ease the formality of compensation hearings and to lessen the number of objections in the record, but it must be admitted that in the end it leads to the fairly strict application of the rules of evidence in compensation hearings. The arrangement of calendars, the order in which witnesses are taken, the number of adjournments granted and the degree of formality observed at hearings are all matters within the rule-making power of the commissions who administer the law. While the same rules of procedure do not apply in any two compensation states, one generalization can safely be made, namely, that the atmosphere in which compensation hearings are conducted in the commission states is considerably less stiff and formal than in the courts. The parties to the controversy, their representatives and witnesses, are all seated around the hearing table, with the presiding commissioner or referee, stenographer and clerk. The witnesses in most jurisdictions do not have to stand when they are sworn, usually there is no formal "summing up" by the counsel for either party, nor are there many long drawn out colloquies between counsel and officials as to whether particular evidence is material or admissible. This procedure is time-saving and puts the parties and their witnesses more at ease than the formality of a court trial. Furthermore, compensation officials in most states grant preferences on their calendars to those cases in which physicians appear, oftentimes suspending the trial of a claim where only lay witnesses are testifying in order to put the medical witness on the stand; and if a certain specialist cannot arrange to be present on the day first appointed for hearing, it frequently happens that the case is set over for hearing on the day best suited to the witness' convenience. To the observer of compensation proceedings in many states, it is obvious that a marked degree of consideration is shown to the medical expert, regardless of the party by whom he is produced.

Any physician specializing in a given field may, of course, be produced by either party to a compensation case; but as a practical matter, such specialist is usually one who has considerable insurance company practice. To get at the reason for this, one must turn again to the statutes which, in all but a few jurisdictions, place the choice of physician treating a compensation claimant with the employer. Since the employer customarily insures medical, as well as cash, benefits with an insurance company, the latter becomes the real agent in selecting the physician or specialist who treats the injured worker. This has led, particularly in large industrial centres, to the concentration of compensation practice in certain groups of physicians whose livelihood is derived chiefly from the insurance companies. And this applies to the specialist or expert, as well as to the attending physician or general practitioner. While both the insurance company and the claimant have the privilege of producing expert testimony, in reality the company is the party who produces by far the greater proportion of it, since the company alone is always in possession of sufficient funds to pay the expert. If enough money is involved in the claim, the injured man may

and often does bring in an expert in his own behalf, whose opinions are invariably in complete contradiction to those of the company's expert. When this happens and expert testimony is not forthcoming from a disinterested source, the compensation official is in the same dilemma as the judge or jury in a court trial when experts disagree; and if only the company produces expert witnesses, the compensation official must either decide all such cases for the insurance company, or disregard the experts altogether. In an endeavor to meet this situation a number of compensation laws from their inception created a staff of state medical examiners attached to the compensation commission to examine claimants at the behest of the commissioners and give opinions as to diagnosis, disability, causal relation of the condition to the injury, or other medical question in dispute.[9] Among such jurisdictions are large industrial states like New York, California and Ohio. Several states have also provided that the compensation commission may, on its own motion, refer injured workers to specialists outside of the compensation department, but selected by the commission, to render to it an impartial opinion on any medical aspect of the case. Among these states are Massachusetts, Pennsylvania, Georgia, Wisconsin and, since July 1, 1935, New York.

New York's experience with the production and handling of expert medical testimony in compensation cases is sufficiently typical and perhaps the most interesting, for New York is the most important industrial state, over 500,000 industrial accidents yearly being reported in prosperous years and around 300,000 annually since the depression. Ever since the enactment of its compensation law, in 1914, a division of medical examiners has been part of the administrative set-up in each compensation district of the state and has been the source of most of the impartial medical opinion, both expert and ordinary, produced in that jurisdiction. During the course of compensation hearings in any district of New York, those claimants whose disability is still in dispute are referred by the referee to the state physician for examination; their cases are then held aside until the medical report is received from the state doctor. If either side objects to the contents of the report, the medical examiner is called to the stand for cross examination. It frequently happens that one of the parties or the referee may at that time put a hypothetical question to the examining physician. It is open to question whether the state medical examiner in the ordinary case can be termed an expert; however, since most of the state doctors have spent some years in compensation work, and since a number of them have specialized and have been assigned to examine cases involving their specialty, there is rarely an objection to their qualifications and the referee may and usually does accept such testimony as

[9] Illinois, Maryland, Massachusetts, Pennsylvania, Georgia, and Virginia also fall in this group, and the seven states which have exclusive state insurance funds—Nevada, North Dakota, Oregon, Washington, West Virginia and Wyoming, in addition to Ohio, have medical advisers attached to the state funds. In some states, even where the law makes no direct provision for a state medical staff or for the appointment of impartial experts to examine compensation claimants, the compensation officials sometimes call in specialists to examine and pass on difficult medical cases. See Hookstadt, *Comparison of Workmen's Compensation Insurance and Administration* (1922) BULL. No. 301, U. S. BUREAU OF LABOR STATS. 57.

expert. Where the case is exceptionally hard-fought or where it involves complicated or serious conditions, such as mental disease, epilepsy, tuberculosis, cancer, cardiac or gynecological conditions, etc., to name but a few, the referee who has heard the previous testimony in the case often calls the chief medical examiner to the witness stand and propounds to him a hypothetical question based upon the history of accident and the medical findings which have been introduced in evidence. When the chief examiner has given his opinion, the party whose side has been adversely affected by his testimony may cross examine. In these cases, the chief examiner may or may not have examined the claimant during the course of the case, but usually he has. In death claims, the testimony of the state doctors is not based in any part upon a physical examination, unless a period of disability, during which the claimant was able to come to the Compensation division for a hearing, has preceded death. It is, then, apparent that much of the expert testimony which comes from the state physicians in disability, if not in death claims, is based not only on the record but also on at least one and frequently several physical examinations. This renders the testimony of greater weight, for the doctor has a surer foundation for his conclusions and is less likely to be confused or to change his opinion under cross examination. The testimony of the state doctors is only evidence to be considered and weighed with that produced by the parties, and the referee may act upon any evidence in the record; in case of conflict, however, the opinion of the state examiner usually turns the scale.

There remains a type of case in which the state physician cannot render an accurate opinion either from having the record put before him or through such physical examination as the facilities of the Compensation division permit. Where the claimant is accused of malingering, or where his condition is so obscure that there is wide difference of opinion as to diagnosis, it may be necessary for the claimant to be hospitalized and observed for a period of days or longer, or subjected to certain difficult tests to reach a correct conclusion. It is even more essential in getting at the truth for such observation or tests to be conducted by a specialist who is chosen by neither side to the controversy, but by an impartial source. Before July 1, 1935, the procedure adopted in such cases in New York was for the chief medical examiner to recommend that the claimant be observed by an outside specialist selected by the Director of the Compensation Bureau. However, since the state made no appropriation to pay for such specialist, the consent of the insurance company had to be obtained, since it paid the bill. Some companies were glad to give their consent in a complicated or suspicious case, while others refused to give it in any case. By the amendment of the law in 1935, the Industrial Board is given authority on its own motion, and the referee on the recommendation of the chief medical examiner, to require the examination of any claimant by a specialist, the latter to be designated by the Industrial Commissioner from a panel of specially qualified physicians submitted by the county medical society. The cost of such impartial examination is thrown

upon the employer or insurance company. Under both the old and new provisions of the law, the report of the impartial specialist is placed in the file of the case and the losing side may call the specialist for cross examination. As a matter of fact, however, this is rarely done. As with the testimony of the state doctors, the compensation official may accept or reject the impartial specialist's opinion, since it is only evidence to be considered with the other evidence adduced; but in the vast majority of cases, the impartial opinion is relied on in the final determination of the claim.

The preceding paragraphs have outlined the sources of and the procedure through which impartial medical testimony, most of it expert, is secured in New York compensation proceedings. The necessity for obtaining some impartial medical opinion in these cases in any jurisdiction, which means the selection of the expert by a disinterested party, cannot be stressed too emphatically, as certain studies in New York in recent years have shown. The New York State Department of Labor, for a period of two weeks in 1930, conducted an unannounced experiment.[10] Every injured worker who came into the information room complaining that he was still ill and had been discharged from medical treatment too soon by the employer's or insurer's doctor, was sent to the examining room and examined by the assistant chief medical examiner. About sixty per cent of such workers were found to be in need of further medical treatment. In November, 1932, the Cullman Committee, which had been appointed by Governor Roosevelt over a year before to study the medical costs of the New York Compensation Law, reported[11] that a study of a cross-section of seriously controverted compensation cases revealed that the testimony of physicians regarding causal relation between accident and ensuing disability, and also as to the extent of disability, was closely correlated with the financial interests of the parties who employed them. Where the carrier and the claimant had both produced medical testimony, the battle of the experts was on. The Committee further reported that in twenty-two cases sent to one impartial specialist by the Department of Labor over a period of eighteen months, where the subject of causal relation was involved, the impartial specialist found in favor of the claimant in fifteen cases out of the twenty-two.

Both the Cullman Committee, and in 1934, the Pool Committee,[12] which had been appointed by Governor Lehman to continue the study of medical problems under the New York Compensation Act, recommended that the choice of physician be taken away from the employer or insurance carrier and that the claimant be given a limited choice of physician from a panel of physicians named by medical societies as qualified to perform compensation practice. In 1935, these recommendations were

[10] See Frances Perkins, *Review of Medical and Hospitalization Costs in Workmen's Compensation Cases* (1932) BULL. No. 577, U. S. BUREAU OF LABOR STATS. 27, 35.

[11] See *N. Y. Times*, Dec. 23, 1932, pp. 1, 8, for a summary of that report and its recommendations. Report of the Committee to Review Medical and Hospital Problems in Connection with Workmen's Compensation Insurance, submitted by the Cullman Committee to Governor Roosevelt in Dec., 1932.

[12] *N. Y. Times*, Dec. 31, 1933, pp. 1, 12, contains an outline of the report and recommendations of the Pool Committee.

enacted into law, the employer or carrier being given the right to have its own physician examine the claimant at reasonable intervals, in order to check on the treatment and conclusions of the panel doctor. It was noted above that the Industrial Board and the referees were given authority by the new law to refer claimants to impartial specialists on their own motion. The rôle of the state medical examiner remains the same under the new provisions as under the old; as a practical matter, however, the examinations by the state physician in future may be more greatly needed as a check on the treatment and opinions of the claimants' doctors, whereas in the past their effect in many cases was to counteract the conclusions of the insurers' physicians.

In any discussion of medical testimony in compensation proceedings it is important to consider the extent to which impartial medical evidence, coming either from state physicians or impartial specialists unconnected with the law's administration, is used. State compensation departments do not collect statistics on this subject, but an occasional study of compensation administration in various jurisdictions touches upon the matter. Pennsylvania was mentioned as one of the states whose law gave the compensation officials power to appoint impartial physicians or surgeons to examine compensation claimants and report thereon. There is also a medical staff attached to the compensation division of the Pennsylvania Department of Labor and Industry. In that state, where the employer or carrier has choice of physician, neither the state doctors nor the outside impartial specialists are used to any great degree. The number of physicians employed as examiners in the compensation division has usually not exceeded four in number for the entire state, and these serve only part time. From June 1, 1929, to June 1, 1931, only $2,600 of the state's funds were expended for examinations by impartial physicians or surgeons.[13] A recent study of the compensation law and its workings in Pennsylvania pointed out[14] that in a cross-section of controverted cases, "impartial medical testimony was virtually nonexistent." In Pennsylvania, therefore, the compensation officials who must pass upon contested cases rely on the experts produced by the interested parties, as in court trials in most jurisdictions.

In contrast to the situation in Pennsylvania is that of Massachusetts, where the claimant has free choice of physician. There the duties of the state medical advisers, of whom there are usually two employed on part time, are not to pass upon the condition of claimants, although that is occasionally done, but rather to advise the Industrial Accident Board on medical matters and to pass on medical bills submitted by claimants' physicians. The cases in which disability, diagnosis, causal relation, etc., are in dispute are referred to physicians selected from a panel of impartial specialists outside of the department. This panel is drawn up by the Industrial Accident Board.

[13] These figures were furnished the writer in 1931 by the Department of Labor and Industry of the State of Pennsylvania.

[14] Horlacher, *The Results of Workmen's Compensation in Pennsylvania* (1934) 40 SPEC. BULL., PA. DEP'T OF LABOR AND INDUSTRY, Pt. 1-b, p. 12.

The compensation act of Massachusetts gives the Board authority to send claimants to these specialists for examination, fixes the fee for this at $5 except in extraordinary cases, where a reasonable sum in addition may be allowed, and provides that the report of such specialist shall be admissible as evidence provided both the "employee and the insurer have seasonably been furnished with copies thereof." In the fiscal year 1928-1929, there were 3,300 examinations by impartial specialists chosen by the Board,[15] the cost of these examinations being $22,960 (payable by the insurance companies, according to the law). In the same period, there were approximately 6,000 contested cases, so that in a little over half of this number the impartial specialist was used. Since the law permits the impartial report to be admitted in evidence without identification, it is only on rare occasions that one of the interested parties calls the impartial specialist for cross examination. In Massachusetts, then, the impartial medical expert in compensation proceedings is relieved from the disagreeable burden of testifying and being cross examined in most cases.

In describing the New York procedure for securing impartial medical testimony in compensation cases, it was noted that much the greater proportion of such evidence is given by the state physicians. The number of cases in New York which are referred to an outside impartial specialist has been very few when compared with those which are submitted to the state doctors. The recent change in the New York law, however, by which the compensation officials on their own motion may refer claimants to specialists unconnected with the administration will in all probability increase the number of these examinations. Statistics are not available as to the total number of cases sent for examination to the state physicians in a given period, nor as to the total number in which the state doctors are called to testify. However, on the female trial calendar in New York City during the week ending September 20, 1935, 269 cases were heard. Out of this number, there were 90 medical examinations by state physicians, or in almost exactly 33⅓ per cent of the 269 cases. In relatively few of these cases was it necessary for the state doctor to testify, although the report of the examination was acted upon by the referee, and placed in the file, ready to be admitted in evidence on identification if a dispute later arose. It should be noted that not all of the 269 cases were actually contested, since both contested and uncontested claims are scheduled for hearing in New York; nor, of course, were medical questions disputed in all of these claims. Furthermore, the run-of-the-mill case in New York, as in all other compensation states, involves only short periods of disability. If the case reaches the calendar for its first hearing after the disability has ceased, there is no need for a medical examination by the state doctor and the referee is compelled to act on the testimony or reports of the attending physician, whether selected by the insurer or the claimant, for only that physician can speak as to the length of disability after it is over. However, where the question of causal relation is at issue and the claimant has been treated only by the insurer's doctor, who denies

[15] Statistics given the writer by the Secretary of the Industrial Accident Board of Massachusetts in 1930.

such relationship; it is then important for the protection of the claimant's rights to call upon the state physician for his opinion. It devolves upon the referee to do this, if the claimant is unrepresented by counsel, and sometimes when he is. If the referee is indifferent, he will act upon the testimony of the attending physician only and fail to call the state doctor to the stand. The executives of the New York Department of Labor have urged the referees to use the state doctors to the fullest extent whenever testimony for the claimant is lacking or difficult to produce. It is probable that the system in New York, with its comparatively large staff of state examiners and with the recent amendment to the law permitting a wider use of impartial specialists, has gone as far as any jurisdiction and beyond most in securing impartial medical testimony in compensation proceedings.

Both parties to a compensation claim, and the compensation officials also in every state use the hypothetical question in order to get the opinions of the medical experts into the record. When the claimant is unrepresented by counsel, it is the duty of the commissioner or referee to take the claimant's physician on direct examination, to cross examine the insurer's doctor and to question the state doctor if necessary. If the insurer's physician has been asked by the company's representative to assume only those facts favorable to the insurer, the referee asks the insurer's physician to assume those facts in the record which are favorable to the claimant. When the state doctor is questioned, the referee usually makes the basis of the hypothetical question as broad as possible, for the broader its scope, the fairer is the picture presented to the witness. If the facts which the state doctor is to assume are so contradictory as to compel him to be the judge of the case in replying to the question, or if there are conflicting histories of accident, one of which would favor and the other negative causal relation or disability, the referee customarily presents two hypotheses to the doctor, and then decides which one is the more tenable according to the weight of all the evidence. When the hypothetical question is handled in this manner, with full opportunity for cross examination granted to the losing side, there can be little complaint that the medical experts are misled or confused by the form of the question.

The medical expert who is called upon to testify in the courts in personal injury actions is often heard to protest against the long delay in bringing these cases to trial. If the specialist has treated or examined the plaintiff during the course of his disability immediately following the accident, and the case is not tried until one or two or even more years have elapsed, the doctor must often depend entirely on his records to refresh his recollection. If such records are not kept in voluminous detail, the doctor may be at a great disadvantage when he is called to the stand to testify, either as an expert or as the attending physician. In most compensation jurisdictions, even when the reports from the employer and claimant are filed promptly, it takes two months or more for the contested case to reach the calendar for hearing, although a few jurisdictions, among them New York, improve on this average where the reports

come in immediately after the accident. While this delay is longer than it should be, nevertheless it is a vast improvement over the conditions in most courts which pass upon personal injury actions, particularly those in large cities, where a delay of one year or even two is not uncommon.[16]

The degree of success which a compensation tribunal attains with expert medical testimony depends on a number of factors, only one of which is of major importance. Compensation procedure, because of its informality and the consideration shown the medical expert in putting him promptly on the stand and in the arrangement of calendars to suit his convenience, is much better adapted to the expeditious production and handling of expert testimony than is the procedure in either criminal or civil cases. But these are relatively minor matters, which go to the form rather than to the substance. The real test is the extent to which compensation administrators make use of impartial, well-qualified medical testimony.

The quality of expert medical evidence when brought in by the interested parties to a compensation claim is no better and no worse than that introduced in court proceedings—some of it is of high calibre, some of it is not, all of it is open to the suspicion of bias to a degree. When the statute does not give compensation authorities power to call upon impartial specialists outside of the administration, and does not create adequate medical staffs as part of the compensation unit, the situation, from the standpoint of justice, is even worse in compensation than in court cases; for in the latter both sides are more likely to be able to pay for expert witnesses; if, then, no light be thrown on the issues, the odds are even between the litigants. In the compensation claim, however, where only one side, the insurance company, is ordinarily able to pay for expert witnesses, the claimant, for whose benefit compensation laws were enacted, is left without protection in the majority of cases.

The impartial medical evidence in compensation proceedings, which means that chosen by the administrators, is on the whole well qualified, and free from the charge of partisanship. The panels from which the impartial specialists, unconnected with the administration, are drawn, are customarily made up by the compensation administrators with the advice of medical experts or medical societies, and contain many specialists eminent in their fields. The state medical staffs may either give full time to their work, as in New York, or part time as in Massachusetts and many other states. In New York, the state physicians are chosen through competitive examination and are appointed under civil service. Where full time is given, the criticism is often heard that the state examiners are underpaid and have little opportunity for advancement unless they leave the state's employ and enter into insurance company practice. While this view has some justification, it is also true that many competent doctors are employed by the state and that they frequently prefer the security of civil service to the uncertainties of private practice, even of insurance

[16] The Supreme Court in New York County, for example, where the more important negligence actions are tried, is said to be two years behind in its calendars at the present time.

practice. Moreover, the state physicians engaged in compensation work soon become experts in their field; since they must always bear in mind the relation of trauma to disease, they can under competent administration work out certain standards which are very valuable as a guide to the administrator in deciding difficult types of cases. This tends to produce a uniformity of decision in contrast, for example, to the unpredictable outcome of most personal injury actions.

The principal defect with impartial medical testimony in compensation states lies not in its quality or method of handling or selection, but in its scarcity. In many states, the reason for this is because insufficient funds are granted either for adequate state medical staffs or for impartial examinations by outside specialists in all cases where they are needed. In other states, the fault lies with the administrators in failing to take full advantage of the powers or appropriations granted. In solving any problem connected with the administration of justice, there must be competent and honest officials to administer the law; and where compensation officials are the agents in securing impartial testimony, they must always be on the alert to keep off the list of impartial examiners those whose practice is derived in the main either from the insurance companies or from compensation claimants. While this may seem to be a large order, it is not impossible of accomplishment even under the existing systems of procedure. Where this is done and where sufficient power and funds are granted to obtain disinterested medical testimony when needed, most of the evils popularly associated with expert medical testimony will be overcome or greatly lessened.

REASONS AND REASONING IN EXPERT TESTIMONY

ALBERT S. OSBORN*

In English and American law the testimony of witnesses is limited and weakened by many restrictions. This procedure is justified by tradition and precedent but much of it is not justified by common sense. An intelligent and honest witness is not permitted to make his testimony as effective and convincing as it might be made, as in France, for example, because of certain old rules formulated and fixed many generations ago by some old men wearing wigs, who have been very dead for many years. The controlling theory seems to have been that there is less danger of error with stories half told than all told. It should of course be remembered that this procedure was developed in English law when only a few men on a jury, if any, could read and write, and most of them had never been out of the little county in which they were born.

These old crippling restrictions apply to all testimony, but in late years the limitations have been loosened somewhat, but not entirely, as applied to some phases of what in the law is described as expert testimony. This special testimony, if it is in fact what its name implies, is the statement of a conclusion, or series of conclusions, resulting from a course of reasoning, and this is especially true of all expert testimony based on a comparison of tangible things.

As is well known, a witness is described in the law as an expert because of his special knowledge and experience, but it does not always seem to be understood that when he expresses an opinion, that the opinion, with the informed witness, is based, not alone upon the specific evidence regarding the problem that is before him, but in some measure also upon his own special knowledge and experience that in fact make him an expert.

Expert testimony on different subjects differs widely. A doctor may make an examination of a patient and express an expert opinion that the patient is permanently incapacitated. In many cases no helpful reasons can be given to an ordinary jury for such a conclusion. This is typical expert testimony. There are other classes of expert testimony, or what is called expert testimony, in which a qualified witness can explain to an intelligent hearer the basis or reasons for the opinion he

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expresses. Testimony of this class is, in fact, the analysis and interpretation of circumstances and facts. The problems may be: Was a certain bullet fired from a certain gun? Were two finger-prints made from the same finger? Were a series of ransom notes in a kidnaping case written by an accused writer? Was a ladder made from lumber from a certain mill? Are two pieces of paper identical? Many other similar problems are encountered in civil and criminal cases.

A mere isolated fact often is an almost meaningless thing, but, when interpreted and explained, may spring into life and almost speak. Real circumstantial evidence is this language of things, and they often testify in a manner that cannot be successfully denied. The most forceful evidence in any court is this much criticised silent evidence of established facts when their relations and significance are clearly shown, but a mere statement of a fact may mean but little to the ordinary hearer. The most important part of expert testimony, when applicable, is of course this reasoning or "why" phase. The mind of even the ordinary man is eager to know the reasons for things and in many instances to understand is to be convinced.

As is well known, the ancient view of all expert testimony was that the expert's mere opinion was to be accepted or rejected wholly on the reputation and qualifications of the witness. This necessarily still is the rule regarding those classes of expert testimony that are not susceptible of illustration and explanation so as to be weighed by the ordinary hearer. This is the class of testimony than can be rendered almost valueless in case of a conflict and in many instances deserves the severest criticism. A bare opinion is a dangerous basis for a verdict.

In this special testimony by an informed and experienced observer, in which facts and circumstances are interpreted, what may appear to be almost an off-hand opinion necessarily is the result of a definite course of reasoning. If the reasoning is not outlined and explained in any way the conclusion may seem to be merely an intuitive opinion, but this is not the fact. When, after careful observation, the witness expresses a formal opinion and then is permitted to outline in detail the reasoning process and steps leading up to the conclusion he has reached, he is then stating audibly what before was a silent mental operation. It is obvious that if an expert opinion is to be properly weighed and considered by the hearer, the reasoning process itself must be outlined as, otherwise, only the result or conclusion of the reasoning is expressed as in typical expert testimony.

This open oral reasoning operation, as a part of expert testimony, is necessarily, in effect if not actually in form, an argument tending to show to the hearer why the opinion is correct. That is its specific purpose. If correctly presented, this testimony analyzes, weighs and connects all the phases of the special evidence, shows their application to each other and to the problem in hand, and leads up to the final conclusion.

While nominally an expert is now permitted to "give reasons" for an opinion, in

some courts he is not permitted to give definite, oral reasoning as a part of the actual testimony. Legal opinions, if not in direct conflict on this specific point, at least have not clarified the problem and have not clearly drawn the distinction between reasons and reasoning in expert testimony. The two classes of expert testimony, described above, are confused.

Many legal opinions, by inference at least, sensibly suggest that there is no distinction and that giving reasons for an opinion includes a presentation of the actual reasoning by which a conclusion is reached, while other legal opinions, and trial judges here and there, in their strict rulings hold that "giving reasons" does not include giving the course of reasoning itself. It is easily understood that this restrictive rule may greatly weaken testimony.

The exact question to be considered is to what extent are firearms, finger-print, wood identification, paper, handwriting and document experts, and other similar experts, to be permitted to outline in testimony the detailed, definite *reasoning* which has led to the opinion expressed. A clarifying legal annotation of this topic is now due. An Ohio opinion—fortunately not usually followed in actual trials even in Ohio—actually states that the evidence must be strictly confined to "what appears on the face of the document." This ruling in effect, if strictly enforced, makes the witness an ordinary witness and not an expert, and greatly weakens, if it does not completely destroy, the testimony. He cannot explain why the physical facts before him warrant a certain interpretation. The ruling holds that the interpretation of the facts does not come within "the four corners of the document." In some important cases this "four corners of the document" rule is strictly enforced.

The restriction of testimony of this class is undoubtedly partly based on the rule that an ordinary witness must not argue, and this detailed, and it may be very effective, reasoning by a witness in testimony as described, is so in contrast with the testimony of the ordinary witness that certain trial judges will not permit it to be given. They appear to be frightened by it. As administered, the rule often seems to be that the more convincing the testimony is, the more objectionable it becomes. Naturally justice may be defeated by the exclusion of testimony of this class.

It should also be better understood that the requirement that expert testimony should, if possible, always include the reasoning by which the conclusion is justified, is highly important, not only that correct testimony may be convincingly presented, but also in order that the frail and unsound basis of incorrect testimony may thus be directly exposed. The presumptuous, or corrupt, witness does not desire to expose the illogical reasoning by which he attempts to bolster up his incorrect opinion. The unqualified witness who testifies against the fact is, of course, unable to show a rational basis for his opinion. The intelligent judge may well say, "You have expressed your opinion but you have not given us the course of reasoning by which your opinion is justified." In the end the judge (at least in New Jersey and in the

Supreme Court of Pennsylvania) may add, "Your opinion may be correct but your reasons to me are not cogent and are not convincing."[1]

The restrictions on expert testimony are usually imposed as the result of objections, but there are some trial judges who, on their own initiative, prevent a witness from giving convincing expert testimony. Many of the objections by counsel have, however, been overruled over and over again by trial judges and courts of appeal, but they are still made.

The various objections presented are well known. Among them are: The testimony is objected to because it is merely argument; because the witness is "lecturing"; because the witness is not simply pointing out "facts appearing on the face of the document" but is "drawing inferences from the facts" and from his own knowledge and experience; because the witness is "estimating the significance or force of the various facts to which he refers"; and finally, that "the witness is directly usurping the province of the jury" by answering "the very question that is to be submitted to the jury."[2]

Unfortunately there are attorneys on the right side of good cases who do not fully understand that reasoning by an expert witness is permissible, and they unknowingly hamper their own witnesses and sometimes not only weaken but in effect almost destroy the testimony. In these cases counsel, of course, are not prepared to make—even if they are disposed to make—the necessary arguments on the force and value of the testimony. As a result of this weakening procedure fraudulent claimants

[1] Henry's Estate, 276 Pa. 511, 514, 120 Atl. 454, 455 (1923): "It may not be amiss to add that the weight of opinion evidence on a question of handwriting depends on the cogency of the reasons given; *here they do not appeal to us as convincing.*" (Jury verdict set aside.)

Magnuson v. State, 187 Wis. 122, 203 N. W. 749 (1925): "A rule of law that would permit an expert to take the stand and state his conclusion without doing any more would place the least qualified, most prejudiced expert on the same level as the best qualified and most conscientious expert. Particularly is this true in regard to the testimony of a handwriting expert, which rests very largely for its convincing power upon the similarities and peculiarities which enable the expert to arrive at his conclusion."

[2] Cropper v. Titanium Pigment Co., 47 F. (2d) 1038 (C. C. A. 8th, 1931); Note (1932) 78 A. L. R. 737, 755: ". . . it is more important to get to the truth of the matter than to quibble over distinctions which are in many cases impracticable, and a witness may be permitted to state a fact known to him because of his expert knowledge even though his statement may involve a certain element of inference or may involve the ultimate fact to be determined by the jury." *Per* Gardner, J.

Dickenson v. Inhab. of Fitchburg, 79 Mass. 546, 555 (1859): ". . . they may readily perceive the force of his reasoning, the soundness or fallacy of his logic, and therefore, judge of his capacity to give an opinion on the subject, and the correctness of his conclusions, and consequently the weight due to his opinion." *Per* Shaw, C. J.

People v. Bird, 124 Cal. 32, 56 Pac. 639 (1899): ". . . but I think that Gibson should have been permitted to state the grounds of an opinion (as to handwriting) to which he had testified, and am unable to appreciate the objection that it was argumentative."

State v. Dunn, 161 La. 532, 109 So. 56 (1926): "The witness was a highly intelligent and thoroughly trained expert. He was delivering his testimony in an orderly, clear and respectful manner, with no more 'lecturing' than was reasonably necessary. . . . It would have been valueless to the non-expert jurors without such explanation."

Cliff v. People, 84 Colo. 254, 269 Pac. 907 (1928): "Another assignment of error is that the trial court erred in permitting the people's witnesses 'to usurp the province of the jury' . . . The expert witnesses did not, and could not, usurp the province of the jury. The jury was at liberty to give to their testimony great weight, little weight, or no weight at all, depending upon all the facts and circumstances in evidence."

succeed and the guilty escape. The attorney who is against the facts naturally favors all restrictions.

There is a common misapprehension regarding conflicts in expert testimony of the second class referred to above. Many lawyers glibly argue that expert testimony is "always in conflict." This is not true of much technical expert testimony. While there are witnesses who will testify on any case, and lawyers who will find and employ them, persuasive expert testimony is usually assailed by quoting old opinions, by bitter and exaggerated argument, by dependence upon the old rules and the favorable rulings of unprogressive trial judges, rather than by the presentation of opposing testimony. At least one technical expert witness is able to testify that in thirteen cases *in succession* there was no conflict.

Within the memory of many practicing attorneys a series of important progressive changes have been made in the legal rules and procedure regarding the admission of expert testimony in American courts. These changes have resulted from certain legal reforms and especially have resulted from the progress of science. All of these reforms regarding the admission of evidence have met vigorous opposition.

As in other legal fields, this opposition has been sincerely maintained by certain naturally conservative lawyers and judges, but this opposition has mainly come from that section of the legal profession whose success as lawyers is based upon the *prevention of proof* and whose main purpose and aim is the defeating of justice for their own profit and the profit of their clients. These are the men who fight for the old rules. In the old days these protesting and objecting men were greatly aided by the old restrictive legal procedure. The clan is not entirely extinct, and, sad to say, the aid is still given and cases are decided against the facts because of the restrictions.

In many trials resourceful defense and claim case attorneys make all the standard objections, which they know will be overruled, in order to create an unfavorable impression regarding the testimony and to interrupt and, if possible, annoy and embarrass a witness and break the continuity and force of the evidence. The purpose of this procedure is of course to prevent proof. It should not be permitted but it continues here and there.[8]

As is true in other fields, many expert testimony problems regarding disputed documents are, in some measure, problems in reasoning. "Why do you say that?" should be answered fully, clearly and explicitly if a hearer is to be led up to a rational conclusion. When testimony is improperly restricted it is, of course, impossible for anyone to say whether it is good or bad, and it then, as in the old days, becomes an appeal, not to the intelligence of a hearer, but simply to his credulity. This class of

[8] Venuto v. Lizzo, 148 App. Div. 164, 132 N. Y. Supp. 1066 (1911): "The conclusion of a handwriting expert as to the genuineness of a signature standing alone would be of little or no value, but supported by sufficiently cogent reasons his testimony might amount almost to a demonstration. While the court in this case did not directly refuse to allow the experts to state their reasons, as was done in the case of Johnson Service Co. v. MacLernon, 142 App. Div. 677, the effect of allowing constant trivial objections and of the erroneous rulings was virtually equivalent to such denial."

testimony often is a shield for crime and an aid to fraud. There were formerly many judges who, by their rulings, made all expert testimony into this credulity testimony.

Correct, detailed, logical reasoning is necessary to show to technically untrained hearers the significance and force of the various details of evidence showing, for example, that a document was fraudulently written over a genuine signature,[4] or to show that writing over a fold in the paper points to an unauthorized addition, or to show from the characteristics of crossed ink lines which was last made, or that a typewritten document was not all written on the same machine.

The absolute necessity for reasoning regarding handwriting testimony, if it is to be effective, can be illustrated in many ways. There are, for example, many system qualities in handwriting, unknown to the ordinary observer, that are as distinctive as a German or Italian accent in speech, and a forgery may violate some of these fundamental qualities. If a witness is not permitted to show the history and significance of these qualities, then the most important and persuasive part of the testimony is excluded.[5]

The modern and progressive conception of expert testimony regarding all these technical subjects is a common-sense and reasonable conception that requires a witness to give testimony so that its force or its weakness can be determined. It is, of course, true that if technical subjects of any kind are to be considered in a trial, then some knowledge of them should be possessed by those in charge of the matter, and if reasoned testimony is to be given this of course presumes technical knowledge and reasoning ability in the witness. Those who try cases of this kind who are ignorant regarding the technical subject will not know what is correct and what is incorrect, and the outcome may be a miscarriage of justice. Uninformed witnesses sometimes give incorrect and misleading testimony that is not properly attacked be-

[4] Brant v. Dennison, *et al*, 5 Atl. 869 (Pa. 1885): "The alleged assignment bears upon its face indications of its having been written over an existing signature. . . . In all such inquiries great latitude in the admission of testimony is neither unreasonable or improper."

Dubois v. Baker, 30 N. Y. 355 (1864): "The object was to show that the note was not written in the defendant's usual manner, but the letters were smaller and more crowded; the plaintiff thereby intending to satisfy the jury that the note was written over a signature of the intestate and was not a note signed by him. . . . It was competent to prove this fact."

[5] Dougherty v. Milliken, 163 N. Y. 527, 57 N. E. 757 (1900): "It may be broadly stated as a general proposition that there are two classes of cases in which expert testimony is admissible. . . . If the knowledge of the experts consists in descriptive facts which can be intelligently communicated to others not familiar with the subject, the case belongs to the first class. If the subject is one as to which expert skill or knowledge can be communicated to others, not versed in the particular science or art, only in the form of reasons, arguments or opinions, then it belongs to the second class."

In re Varney, 22 F. (2d) 230, 237 (E. D. Ky. 1927): "As to the testimony of the five bankers, relied on by the claimants, it is greatly weakened by the consideration that not one of them gave a reason for the faith that was in him. . . . I was entitled to have the basis of the opinons of these bankers in order that it might test their soundness, and this has not been afforded me. I never like to follow anyone blindly." *Per* Cochran, J.

Pioneer Coal Co. v. Polly, 208 Ky. 548, 271 S. W. 592 (1925): "They testified, in substance, that the decedent's signature on the register was not written by him, according to their opinion. They referred to no fact nor pointed out any reasons for their statements and left their flatly stated opinion unaided by the statement of any fact to enable either the court or the jury to draw a legal conclusion as to the accuracy of their testimony, or its probative effect."

cause there is no one present, no witness, lawyer, or judge, who knows whether it is good or bad. When the blind leads the blind they may both fall into the ditch.

The foregoing discussion forcibly suggests that unqualified witnesses should not be allowed to testify as experts. Hundreds of alleged experts testify who should not be permitted to testify. If the witness cannot weigh or estimate the force and significance of the evidence upon which a conclusion is based, then his opinion is not an expert opinion but is a mere conjecture of a dangerous character. Much testimony of this kind is given that should not be received in any court. It is very seldom that the testimony of an alleged expert of any class is excluded, no matter how stupid or incompetent he may be. In many instances he is no better qualified to give an opinion on the subject under inquiry than any intelligent juror. This fact should be brought out in some manner.

The "qualifying of an expert" is a performance which is supposed to prove to the judge that the witness offered is in fact an expert. This procedure in many American courts has become a mere formality that precedes the presentation of expert testimony by anyone who assumes to be an expert or whom the lawyer presents as an expert. Stricter rules would prevent the advocate against the fact from bringing into court any old dead cat of an expert that he has found in a back alley. It usually is not a lack of legal right, or lack of courage, in the judge that allows almost anyone to testify as an expert, but an act in conformity with an almost universal custom.

It would no doubt contribute to justice if the requirement was made that a written statement of a proposed expert's qualifications should be presented to the presiding judge in advance of the trial so that his qualifications, his record and experience could be carefully investigated. Like the new law regarding advance notice of a proposed alibi, this requirement would promote justice by limiting expert testimony.

The alleged expert witness also should always be properly cross-examined, which of course is impossible if counsel is unassisted or technically unprepared. It naturally follows that those who conduct trials should have some information on the subjects considered in those trials, or decisions should not be based on the technical testimony alone.

Finally, and perhaps most important of all, the informed, fair and unprejudiced judge, with power to participate and assist in a trial, is the most important performer in a trial court if technical testimony is to be properly presented and correctly weighed. There are more of these judges than there were, and there will be more of them than there are.

THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE IN CRIMINAL CASES

FRED E. INBAU*

Sherlock Holmes with his lens and his theories probably has afforded considerably more entertainment to readers of his unique experiences than he has created serious thinking on their part as to the practicability of actually applying such methods and techniques in detecting crime, and in utilizing in criminal trials the evidence resulting therefrom. Other detectives of the fiction world, with the possible exception of Doctor Thorndyke, have done still less to arouse more genuine interest in scientific methods of crime detection. We have been content, it seems, to keep such figures within the veil of our imagination and to reconcile ourselves to ordinary police methods when attempting to solve a crime involving unconventional tactics or motives, to say nothing of the more usual type, in which the scientific approach is equally desirable. Only quite recently has there been any indication of a change in attitude, and this has resulted from the unrelenting pioneering efforts of relatively few individuals qualified to render scientific assistance to law enforcement agencies. The general notion has become a little more widespread, but considered in terms of what might be accomplished the era of scientific evidence has only begun.

During this somewhat transitory period the judiciary, along with the police of this country, is receiving considerable criticism from some quarters for not utilizing to any greater extent the assistance which scientists are prepared to offer in this field. In partial defense for this position a police officer is often prepared to say: "What good are your scientific methods if the facts we obtain by using them are inadmissible as evidence?" He is, as a general rule, entirely unfamiliar with the legal status of testimony or facts of a scientific nature, and his conclusion of inadmissibility is very often erroneous—and even in instances where he is correct he frequently fails to appreciate the advantage of the scientific approach for investigative purposes alone. The layman is still more apt to find the courts responsible for not offering more encouragement to the scientist and to the police in this respect. Lawyers themselves often display guilty complexes when such discussions arise, but they too seem oblivious to the fact that in many of the recorded opinions of the appellate courts of this

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country may be found some of the most interesting detective stories ever written, principally because of the reality of the situation.

Consider, for instance, the case of *Magnuson v. State*,[1] decided in 1925 by the Supreme Court of Wisconsin. The facts, as stated by that court, may appear to have been taken from a pulp paper magazine rather than from a judicial opinion. But there was no fiction involved. The almost unbelievable mass of scientific evidence presented to the jury was sufficiently convincing to sustain a conviction of murder in the first degree.

A bomb had been sent through the mails, and upon reaching the addressee, who opened the package, there followed an explosion which caused the death of one person and serious injury to another. The only clues with which the police had to work were the remains of the home-made bomb and fragments of the paper-wrapper containing the address.

An examiner of questioned documents who had been consulted suggested that the spelling of the town address (Marsfilld for Marshfield) was characteristic of a person familiar with the Swedish language. The only person known to have any enmity toward the recipient of the package happened to be the only Swede in the vicinity—the defendant, John Magnuson.

From the pieces picked up about the home of the deceased, the bomb was reconstructed, and was found to have been made of a hollow piece of white elm, a piece of gas pipe, a brass tube, and a small piece of steel used as a trigger. The suspect's premises were inspected. Pieces of gas pipe, of brass tubing, and other materials were seized, including a bottle of ink, and sawdust and shavings from the work bench. A triangular trip or trigger was taken off the suspect's gasoline engine, because of its resemblance to the trigger found in the bomb.

With these materials in hand, counsel for the state set to work to establish the fact that the bomb was manufactured and sent by the defendant. Samples of the defendant's handwriting were introduced in evidence, together with testimony of three of the country's foremost document examiners to the effect that the handwriting found upon the paper wrapper was that of the defendant. Further testimony was admitted which established the fact that a fountain pen with a round point had been used, similar to that found in the defendant's home, and that the ink used to address the package gave the same chemical reaction as that found in the fountain pen. Also, an analysis of the glue used to fasten down the string disclosed the fact that it was the same kind as that found in the defendant's possession. A botanist from the U. S. Forest Service Laboratory testified that the sawdust taken from the defendant's workbench was of white elm—a significant fact because the defendant denied that he had ever worked with elm in his shop. Expert testimony further disclosed the fact that the trigger on the bomb came from the same piece of steel as the trigger taken from the defendant's gas engine. This conclusion was based upon

[1] 187 Wis. 122, 203 N. W. 749 (1925).

the similarity in the crystalline structure and formation of the two pieces of metal, as revealed in photomicrographs.

All this evidence was admitted by the trial court, and received the approval of the Supreme Court of Wisconsin:

"We have set out the evidence with greater particularity than would ordinarily be warranted under such circumstances, because it discloses what may be done by a diligent prosecuting officer who has an intelligent comprehension of the things that are necessary to establish guilt in a case of this importance. The guilt of the defendant is as conclusively established as it is possible for it to be. It is scarcely conceivable that any jury could find otherwise than did the jury in this case."[2]

Is there anything discouraging in the language of this court?

Another very interesting case is *State v. Clark*,[3] decided in 1930 by the Supreme Court of Washington. A young girl was brutally assaulted as she passed through a wooded field on her way home from school. Her assailant had constructed a blind near the path-way, and for this purpose he used twigs and tree branches, which he had cut with a knife. The police apprehended a suspect, but the girl was unable to identify him with any degree of certainty. Nevertheless, science came into play, and secured a conviction where conventional methods of proof would have failed.

At the trial of the culprit, an expert testified and was able to prove, with the aid of photomicrographs, that the knife found in the possession of the accused person was the knife that cut the twigs and tree branches of the blind in which the girl had been assaulted.

The conviction was affirmed, and in its opinion the court had this to say for science in its application to matters pertaining to criminal justice:

"Courts are no longer skeptical that, by the aid of scientific appliances, the identity of a person may be established by fingerprints. There is no difference in principle in the utilization of the photomicrograph to determine that the same tool that made one impression is the same instrument that made another impression. The edge of one blade differs as greatly from the edge of another blade as the lines of one human hand differ from the lines of another. This is a progressive age. The scientific means afforded should be used to apprehend the criminal."[4]

The last two remarks should offer encouragement to the men who are devoting their lives to studies of this nature. The entire opinion represents an invitation to them to utilize their most acute methods not only for the purpose of apprehension but also for the purpose of conviction in a court of justice.

In 1929 the New Jersey Court of Errors and Appeals rendered a decision in a case involving a most interesting set of facts—*State v. Boceadora*.[5] The defendant was suspected of having shot and killed the occupant of a home while in the act of committing burglary. In an effort to determine the defendant's whereabouts at the time of the murder his common law wife was questioned as to her knowledge of

[2] *Id.* at 131, 203 N. W. at 753.
[3] 156 Wash. 543, 287 Pac. 18 (1930).
[4] *Id.* at 549, 287 Pac. at 20.
[5] 105 N. J. L. 352, 144 Atl. 612 (1929).

the affair. She finally informed the investigators that on the particular night in question the defendant told her that he had fled from the scene of a burglary and had disposed of his pistol by throwing it away as he ran from the scene of the crime. The weapon was never located.

About a month prior to the murder, another home in the community had been burglarized, and among the articles stolen were some jewelry and a hammerless revolver. For some reason the owner became involved in the present investigation and he identified as his stolen property some jewelry in possession of the defendant's wife. The evidence indicated that this had been given her by the defendant. It was inferred, therefore, that if the defendant had stolen the jewelry he also was guilty of the theft of the revolver. Consequently, if there were any means of connecting that particular weapon with the murder in question, this would constitute a material factor in establishing his guilt.

It so happened—and herein is the strange feature of the case—that the owner of the stolen weapon had fired a bullet from it into the ground near his home, as part of a holiday celebration some year or two previous to the theft. It was suggested that this be retrieved for the purpose of comparison with the fatal missile, since there was no evidence weapon from which a test bullet could be obtained. Fortunately it was found. An examination was made by an expert with the aid of a comparison microscope, and he was permitted to testify at the defendant's trial that this old bullet and the fatal bullet were fired from the same pistol. This evidence the appellate court considered sufficiently reliable to sustain a conviction of first degree murder.

Is there anything discouraging about this case? Certainly it cannot be said that the court considered itself bound by precedent established in dusty old law books, because there was no such precedent for so unusual a case, although the science of firearms identification itself had already received judicial sanction.

Many other equally interesting cases might be mentioned, such as *People v. Wallage*[6] and *State v. Johnson*,[7] to say nothing of the famous Hauptmann case, and others of which we have no judicial record because appeals were not taken to superior courts.

In the Wallage case, principally because of the following facts, an automobile was identified as being the one involved in a hit-and-run accident: similarity in chemical composition between a sample of paint taken from the dented portion of an automobile fender and a specimen of paint present on the shirt worn by the deceased at the time of the accident; the presence, as revealed by a microscopic examination, of minute lines or scratches on the automobile fender where the paint had been rubbed off, which corresponded in number—thirty-one to the inch—with the raised threads in the cloth of the shirt; and the further fact, as stated in the opinion of the expert witness, that from a microscopic examination of other scratches and an examination

[6] 353 Ill. 95, 186 N. E. 540 (1933). [7] 37 N. M. 280, 21 Pac. (2d) 813 (1933).

of the right suspender buckle in the back of the overalls worn by the deceased child, he found that the scratches on the fender were of the "same contour, design and size" as the buckle of the overalls worn by the deceased.

In the Johnson case, finger nail scrapings taken from a young girl, the victim of a criminal assault, and of a suspect, furnished a very convincing bit of evidence indicating the suspect's guilt. An expert found in the debris taken from underneath the deceased's nails several plant fibers colored blue, which he described as identical in appearance with cotton fibers scraped by him from the blue and white overalls worn by the defendant on the night in question. Chemical tests disclosed that the debris removed from underneath the fingernails of both the deceased and the defendant contained, in addition to skin particles, "a number of small bright carmine red particles, highly transparent, . . . and identical in color, appearance, and refraction," from which facts it was inferred that the "Kiss-Proof" lipstick worn by the deceased constituted the common origin of both specimens of evidence.

The road to judicial recognition of scientific evidence is not always an easy one, as indicated by the historical development of firearms identification testimony in the state of Illinois. In examples like this the layman finds some support for his criticism of the courts concerning such matters.

In 1923, in *People v. Berkman*,[8] the Supreme Court of Illinois failed to appreciate the significance or the possibilities of this new phase of circumstantial evidence. It even went so far as to label as "preposterous" the suggestion that distinctive markings were impressed upon bullets fired from different pistols of the same caliber and make. In 1930 the same court had before it another case involving the admissibility of firearms identification testimony—*People v. Fiorita*,[9] in which the decision represents what might be termed the second stage in the progressive evolution toward judicial acceptance in Illinois. The appellate court recognized the accuracy of the science itself but reversed the case because of the incompetency of the expert witness. Instead of branding firearms identification as "preposterous," however, the court stated that while the science was well recognized "both in this country and abroad, testimony based upon it should be admitted with the greatest care. No witness should be permitted to testify regarding the identification of firearms and bullets by the use of this science unless the witness has clearly shown that he is qualified to give such testimony." Notice the change of attitude during that brief seven year period since the decision of the previous case! And then consider the third stage—the decision in the landmark case of *People v. Fisher*,[10] decided four months later. In this case firearms identification finally received the stamp of approval by the Illinois Supreme Court. The trial court had heard the testimony of a competent witness so the appellate court, pursuant to the policy laid down in the Fiorita case, completely recognized as trustworthy the same science it had labeled as "preposterous" only five years previously.

[8] 307 Ill. 492, 139 N. E. 91 (1923).
[9] 339 Ill. 78, 170 N. E. 690 (1930).
[10] 340 Ill. 216, 172 N. E. 743 (1930).

This display of caution by the Illinois courts the layman does not seem to understand. In 1923, when the first Illinois case came up for consideration, the science of firearms identification was yet in its infancy. For that reason we should not be surprised to find a court unwilling to accept it as evidence, although the use of the word "preposterous" formed an unnecessary part of the court's opinion. Nevertheless, today there is no longer any question regarding the admissibility of firearms identification evidence, not only in the State of Illinois, but in all other jurisdictions as well. The appellate courts of thirteen states, and one federal circuit court of appeals, have definitely signified their approval of its use in criminal cases, and even though the problem has not presented itself for the consideration of the appellate courts in other jurisdictions, there appears to be no reason to expect a contrary ruling.[11]

Another type of scientific evidence which was utilized by the police long before it received judicial sanction is that of finger-prints. Although for years the science of fingerprint identification played an important part in police investigations, it was not until 1911 that an appellate court in the United States passed upon its admissibility as a link in the chain of circumstances indicating the guilt of an accused individual. In that year, the Supreme Court of Illinois, in *People v. Jennings*,[12] took judicial notice of the fact that the finger-prints of any individual are so distinctive as to permit their use for the purpose of identification, and admitted expert testimony as to the similarity between the evidence print and that of the defendant—under the general common law rule that whatever tends to prove a material fact is relevant and competent.

Since the Jennings decision a number of others have been rendered by various state appellate courts upon the subject, among them being the highest tribunals of New Jersey, New York, Arizona, Oklahoma, and North Carolina. In every instance such evidence has been held admissible. Moreover, palm-print evidence occupies the same judicial status, according to the decisions in several cases rendered by the appellate courts of Arizona, Vermont, and Michigan. The courts have even gone to the extent of admitting finger-print evidence in instances where an accused's prints (those used for comparison) have been taken under compulsion.[13]

The one type of scientific evidence with which the courts have done some obviously unnecessary wrangling is that of handwriting identification, one of the principal problems arising in the broader field of expert examination of questioned documents. For historical reasons the courts were very insistent, until recent years, that the only documents which could be used for comparison were those "in the

[11] See Inbau, *Scientific Evidence in Criminal Cases: I. Firearms Identification—"Ballistics"* (1933) 24 J. CRIM. L. & CRIMIN. 825, 842. This article also contains a discussion of some of the related problems in firearms identification such as the determination, from a study of powder burns and shot dispersion, of the distance at which a gun had been fired.

[12] 252 Ill. 534, 96 N. E. 1077 (1911).

[13] See Inbau, *Scientific Evidence in Criminal Cases: III. Finger-prints and Palm-prints* (1934) 25 J. CRIM. L. & CRIMIN. 500-517.

case for other purposes." This restriction seriously hampered the expert witness, and, as Mr. Albert S. Osborn has remarked, "the whole history of the subject has been clouded by this unfortunate procedure."[14] But today, either by statute or by decision, the expert may avail himself of standards for comparison even though they are to be introduced in evidence for that purpose alone.[15]

As to the intrinsic merits of expert examination of handwriting and other documentary evidence, the courts were not so slow in their appreciation. Therefore, with the removal of the restriction upon the use of unrelated standards and a recognition of the advisability and necessity for the use of expert testimony in this field, today an attorney handling a case involving disputed documents may, without much difficulty, present an expert witness in court to prove (with certain limitations in particular instances) any or all of the following: identity of an anonymous writing; genuineness or spuriousness of a signature; that a certain person did or did not execute a questioned signature or a forgery; the presence of erasures, alterations, substitutions and additions; sequence of writing; the identity of typewritten material; and the identification of materials of writing, such as ink, paper (more generally as to type only), etc.[16]

Another type of evidence of a scientific nature which seems destined to eventually play an important rôle in our judicial system, but which is barred at the present time, is that regarding the detection of deception. Several attempts have been made to introduce evidence obtained by the use of so-called "lie-detectors," but in each instance admissibility has been denied. However, even in these adverse decisions the courts have sounded a note of encouragement.

Especially noteworthy in this connection is the language of the District of Columbia Court of Appeals in its decision of *Frye v. United States*,[17] which involved the admissibility of a psychologist's testimony regarding a deception test made upon the defendant by the use of a "systolic blood pressure" method. Since very little was known at that time, 1923, about scientific methods of detecting deception, the court may have been inclined to label as "preposterous" the notion that there exists a correlation between blood pressure changes and deception. However, it chose to use the following language:

"Just when a scientific principle of discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

"We think that the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would

[14] See OSBORN, QUESTIONED DOCUMENTS (2d ed. 1929) 26.
[15] Hall v. State, 171 Ark. 787, 286 S. W. 1026 (1926).
[16] See numerous cases cited in concluding chapters of OSBORN, *op. cit. supra* note 14.
[17] 54 App. D. C. 46, 293 Fed. 1013 (1923), Note (1925) 34 A. L. R. 145.

justify the courts in admitting evidence deduced from the discovery, development, and experiments thus far made."[18]

Since 1923 considerable progress has been made in this field of detecting deception, but still not enough to justify its court application, according to a 1933 decision of the Supreme Court of Wisconsin, in *State v. Bohner*.[19] In this case defense counsel offered to prove by means of a "lie-detector" the truthfulness of the defendant's alibi, which offer the trial court refused. Upon appeal the Supreme Court conceded that the instrument (one recording pulse wave, blood pressure changes and respiratory changes) "may have some utility at present, and may ultimately be of great value in the administration of justice." Nevertheless, the court was of the opinion that a "too hasty acceptance of it during this stage of its development may bring complications and abuses which will overbalance whatever utility it may be assumed to have."[20]

The possible "complications and abuses" constitute a constant source of concern on the part of those persons actively engaged in this field. They realize, from the data and information already at hand,[21] that the results of a detection of deception test with a suitable instrument recording pulse wave, blood pressure and respiratory changes, and perhaps other physiological reactions, when conducted and interpreted by a competent and honest individual are worthy of consideration as evidence for or against the defendant in a criminal trial, but they also realize, and only too well, that once given unlimited judicial approval the entire field immediately lends itself to prostitution by unethical and incompetent examiners. The fact that the method is nothing more nor less than a diagnostic technique,[22] the value of which depends to a very considerable extent upon the competency of the examiner, and certainly to the same degree upon his integrity, entirely justifies the conservative position taken by the courts in the *Frye* and *Bohner* cases. In this field, more than in any of the others previously discussed, the remuneration for quackery is unlimited. With this consideration in view, the Scientific Crime Detection Laboratory of Northwestern University School of Law, which for the past five years has been the center of research and actual case work in this field, proposes only a conditional and restricted use of an instrument of this nature for court purposes—at least for the time being, and perhaps for quite some time to come. The prerequisite to the admissibility of such evidence should be a stipulation or agreement between counsel for prosecution and defense, made prior to the expert's examination, that the results and the expert's

[18] *Id.* at 47, 293 Fed. at 1014. [19] 210 Wis. 651, 246 N. W. 314 (1933).

[20] In this opinion there is a quotation from defense counsel to the effect that the defendant offered to prove "by Prof. Leonarde Keeler of Northwestern University . . . that the defendant . . . was not guilty." The language may convey the impression that Mr. Keeler actually conducted the tests, and participated in the case. As a matter of fact, however, he did not test the defendant. The extent of his participation consists of correspondence with defense counsel, in which Mr. Keeler consented merely to examine the defendant and to render a report to defendant's counsel.

[21] See Inbau, *The "Lie-Detector"* (1935) 40 THE SCIENTIFIC MONTHLY 81-87.

[22] See Keeler, *Debunking the "Lie-Detector"* (1934) 25 J. CRIM. L. & CRIMIN. 153-160.

interpretation thereof are to be admitted without objection and regardless of whether they favor the cause of prosecution or defense. This, of course, presupposes an agreement between counsel upon the expert himself. In this way the probability of incompetent and unethical practices would be reduced to a minimum.

In a recent Wisconsin case, *State v. Loniello and Grignano*,[23] the Circuit Court of Columbia County approved of such a stipulation and agreement as that outlined above and admitted so-called "lie-detector" records and also expert testimony concerning their interpretation. Along with this, of course, other evidence of the usual type was introduced. A conviction resulted but no appeal was taken by either defendant.

This analysis of court decisions might be extended to cover a much wider variety and number of cases involving scientific evidence, but those discussed thus far should serve to indicate that the courts of this country are ready and willing to adopt, though with caution, the otherwise recognised evidence which may result from the application of scientific methods to criminal investigations.

[23] February 7, 1935, Judge Clayton F. Van Pelt presiding. See Inbau, *Detection of Deception Technique Admitted as Evidence* (1935) 26 J. CRIM. L. & CRIMIN. 262-271.

THE EXPERT WITNESS IN CRIMINAL CASES IN FRANCE, GERMANY, AND ITALY

MORRIS PLOSCOWE*

The basic character of the criminal procedure in any country determines the position of the expert witness. In France, Germany, and Italy, the procedure is inquisitory as contrasted with the contentious or accusatory Anglo-American procedure. In these three continental countries, an investigating magistrate conducts an impartial judicial inquiry into the most important criminal cases, and prepares them for trial. He is known as the *juge d'instruction* in France, the *Untersuchungsrichter* in Germany, and the *giudice istruttore* in Italy. His mission is to get at the truth of each criminal charge and he therefore gathers evidence both for the prosecution and for the defense. Being a judicial officer, he is endowed with wide powers of arrest, preventive detention, search and seizure, etc., to aid him in his investigations. The results of his investigations, embodied in written documents, have a profound influence at the trial.

Trial procedure, too, is essentially inquisitory in the three countries under consideration. Although the prosecutor and defense counsel are on hand to protect the interests they represent, they do not dominate the trial as they do in England and America. A continental trial is actually conducted by the presiding judge. He does most of the questioning. His duty is similar to that of the investigating magistrate; he must get at the real facts in every case. He examines the witnesses, the experts, the accused, and does whatever is necessary to clear up the criminal charge.

In this inquisitory criminal procedure the expert witness appears fundamentally as an auxiliary to the investigating magistrate or to the trial judge in getting at the truth.[1] In most cases it is completely within the discretion of the investigating magistrate or trial judge as to whether or not he will in any particular instance order the employment of an expert. The prosecuting attorney or the defendant may de-

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[1] So far is this true in Germany that when the judge chooses a certain expert for specific operations, his participation in the procedure may be challenged by the parties on the same grounds as a judge may be challenged, *e.g.*, interest, enmity, relationship, etc. STRAFPROZESSORDNUNG, Art. 74.

mand that an expert be named to make a specific investigation but the decision rests fundamentally with the judge. He will usually designate an expert, "whenever investigations are necessary which demand a special knowledge of particular sciences or arts."[2] The need for the expert arises very frequently in criminal cases on the Continent. The insanity defense is as popular with European defendants as with American, requiring the intervention of psychiatrists.[3] Doctors who have specialized in legal medicine give their expert opinions on causes of death, the nature and gravity of wounds, etc. Expert accountants are called upon to unravel the complicated juggling of financial swindlers and bucket-shop operators. Toxicologists and chemists are put upon the trail of poisoners, food adulterers, etc. In one recent French case, expert physicists were used to test the claim of a Polish inventor who had obtained considerable sums of money on the strength of a purported discovery which realized the alchemist's dream of turning base metals into gold.

In order to provide some guarantees of competence in the individuals chosen as experts, official lists are drawn up in every country in the various fields of knowledge. In France, the list is drawn up annually by the Court of Appeal in each jurisdiction, on the nomination of the courts of first instance. For particular fields of knowledge, specific requisites of capacity are laid down by law. A candidate for inscription on the medico-legal list, for example, must have practised medicine for at least five years, or have a degree in legal medicine from the University of Paris. In Italy, the "specialists," the officially designated experts, receive this title from the Ministry of Education if their education and prior experience is considered sufficient. In Germany the official list of experts is compiled by the president of the *Landgericht* (Superior Court of General Jurisdiction). In medico-legal matters, however, permanent consultants are named, known as *Gerichtsarzte,* to the courts, particularly those in the large cities. In Prussia, the state health officer *(Kreisarzt)* in the smaller centers serves as the medico-legal consultant for the court of his district.[4] In university cities, these *Gerichtsarzte* are frequently the professors of legal medicine of the medical faculty.

In all three countries the institutes of legal medicine[5] are frequently called upon for assistance in medico-legal matters. So significant in this field is the work of these

[2] CODICE DI PROCEDURA PENALE (1931) Art. 314.

[3] The latter may, under the German and Italian law, obtain an order from the judge for the detention of the defendant in an institution for a specified period for purposes of observation.

[4] In the various provinces of Prussia there exists a medical council of at least five members which acts as a sort of Court of Appeal from the opinions of the expert charged with the original investigation with a final appeal to a scientific commission in Berlin. 2 RAPMUND, DER BEAMTETE ARZT UND ARZTLICHE SACHVERSTANDIGE (Berlin, 1904) 67 *et seq.* Special organizations also exist in Germany to provide expert assistance to the Courts on particular matters. In copyright disputes, for example, there is attached to the Ministry for Science, Art, and Education, a commission for each one of the five principal branches of artistic activity, composed of the leaders in the various fields.

[5] The first institute of legal medical was founded in Vienna in 1804. Vienna's example was followed by the medical faculties of many universities throughout Europe. The professor of legal medicine is usually put in charge of the institute. Many institutes are handicapped by inadequate facilities and funds. The discussion of medico-legal institutes herein is based on materials presented in a volume on the

institutes, which have no counterpart in this country, that, at the risk of digression, their activities will be briefly depicted at this point.

The medico-legal institute performs two functions, in addition to its research activities. First, it provides expert assistance to the judicial and administrative authorities in medico-legal matters. The autopsies in all cases of homicides, suspected deaths, or suicides are usually performed at these institutes. In addition their aid is frequently sought by the police, prosecutors, and judicial authorities whenever scientific methods must be used in criminal investigation. The making of toxicological investigations in suspected poisonings, the identification of firearms, the examination of the victims of sexual crimes, of blood-stains, seminal stains, and hair, are among the routine duties of these institutes. The expert opinion of the institute personnel is eagerly sought in matters pertaining to the civil law as well as in connection with the criminal law. They may be called in to determine the causes of accidents, the nature of injuries, the parentage of bastard children, the origin of fires, etc. In five provinces of Northern Italy, a large part of the insurance work is done by the officials of the medico-legal institute of Siena.

The position of the medico-legal institutes in the administration of civil and criminal justice is either authorized by law or is the result of informal arrangements between the members of the institutes and the administrative and judicial authorities. In Denmark, for example, the law provides that all the legally required autopsies for two-thirds of the country, shall be performed at the medico-legal institute of Copenhagen. The Danish laws have also made the institute the medico-legal center for the entire country in other matters. In Italy, on the other hand, no law requires that the administrative and judicial authorities employ the institutes for specific inquiries.[8] Nevertheless the authorities have recognized the expert character of the institute's personnel and methods and have made increasing use of their resources. In other European countries, as in Germany and Austria, much medico-legal work has come to the institutes through the position of their directors and assistants as official experts for the courts.

The institutes perform a second function in serving as a center for the teaching of legal medicine. Legal medicine has come to have a growing importance in the medical school curriculum. Many European universities now require their medical school students to take a course in this subject before graduation. Many countries also require their public health officers and their state doctors to study and be examined in legal medicine as a preliminary to appointment. The growing appreciation of the importance of a knowledge of legal medicine for the administration of civil and criminal justice has also fostered the establishment of courses for law students. Special courses are also arranged in some countries for police officials,

subject published by the Rockefeller Foundation. Rockefeller Foundation, Methods and Problems of Medical Education (9th series, 1928).

[8] A specific provision of the prior Italian Code of Criminal Procedure, CODICE DI PROCEDURA PENAL (1914) Art. 209, gave to the directors and assistants of these institutes a preferential status.

judges, and prosecutors. The teaching is done at the medico-legal institutes. Students are usually given both a theoretical course of lectures and some practical contact with the day-to-day materials that pass through the institute. Many of the institutes have excellent collections of pertinent medico-legal materials (museums) which facilitate the task of teaching.

To return to the expert and his work, this usually begins in the preliminary stages when the case is being prepared for trial. The task he must do is set out for him by the investigating magistrate. The expert then proceeds under no control except that of the magistrate to make the necessary tests upon which his opinion will be based. The defendant, except as he himself is the subject of these tests, may not be present at these proceedings. Nor may he designate an expert of his own choosing to supervise or to observe the operations of the official expert. The defendant may, of course, choose an expert to assist him in the preparation of his defense. But the latter will not necessarily have a chance to make an independent examination of the persons or things which are the subject of the *"expertise."* The Italian Code specifically provides[7] that even where such examination is possible, it may only be had if the investigating magistrate consents thereto. In any event, the closing of the preliminary investigation must not be delayed by this privilege granted to the defense. Thus the defense expert will have to assume in most cases the correctness of the experiments of the official expert. The defense expert will not have a chance to repeat them. His functions in the preliminary procedure will be limited therefore to a criticism of the written report which the official expert makes to the investigating magistrate. The defense expert may also submit a report to the magistrate, embodying his criticisms and opinions, which will be added to the dossier of the case. But this report, since it is a partisan document, will not have the same weight in the determination of the rest of the procedure as will the report of the official expert.

It is only at the trial, in a French and German court, that the defence has any very effective chance to impugn the findings of the official expert. The latter must testify orally. The written report he made in the preliminary stage serves as a basis for his examination. He may therefore be submitted to cross-examination by defense counsel who may also call his own experts to contradict the official expert. Thus the battle of experts is not avoided by French and German procedure. The lines, however, are somewhat differently drawn than in America. Both experts are examined originally by the presiding judge and not by the prosecutor or defense counsel. Only when the judge completes his examination may supplementary questions be put by the prosecutor and the defense. Moreover, the French and German experts are not confined by any restrictive rules of evidence in giving their opinions. French and German evidentiary rules are much more liberal than Anglo-American. Experts in Europe are not strait-jacketed by hypothetical questions.

Only the Italians have provided a means of avoiding the battle of experts. Instead

[7] CODICE DI PROCEDURA PENAL (1931) Art. 324.

of having the experts testify orally as to their findings, their written reports are read. The official expert may, however, be called by the prosecution or the defense to elucidate orally his written report. The defense expert does not have the same privilege.[8] In the Italian view, he is a mere technical assistant to the defense and anything which he has to contribute by way of oral discussion may be brought out in the arguments of counsel at the end of the trial.

There is much dissatisfaction with the organization of expert testimony on the continent. In France it is stated that the vices of the *"expertise"* are one of the principal sources of judicial error.[9] There are many reasons for this dissatisfaction. In the first place, the existence of an official list from which expert witnesses must be drawn does not necessarily insure competence in the expert chosen by the judge. Inscription on the list gives the individual a certain standing and prestige in his profession. As a consequence, in France at least, political and other extra-legal influences which have nothing to do with the merit of the candidate are used to obtain inscription on the list.

The designation of incompetent experts by the judge would not be so serious if the official and the defense experts were on the same plane. But as we have seen, the defense expert is relegated to a secondary rôle to a greater or lesser extent in every country. The opinion of the official expert, since it is supposed to emanate from an impartial source, is all important. Although investigating magistrates and trial judges are free to make their independent evaluations of the expert's findings, they are usually incapable of doing so. They do not have the necessary technical training to make an authentic criticism. The report of the official expert is therefore usually conclusive.

Because of the decisive influence of the report of the official expert, some supervision over his operations by the defense becomes absolutely necessary. Even the best of experts may make mistakes. Yet the defense at the present time has no check upon the accuracy of the operations which are the basis of the expert opinion. A proposed French reform would therefore provide the necessary controls by the defendant over the work of the official expert. The investigating magistrate would be required to appoint two experts, an official and a defense expert. All the operations prior to the formation of the opinion would be performed by both men. If the two experts come to different conclusions then a third expert will be appointed by the magistrate. This procedure is already used in France in special cases, such as adulteration of food, frauds in merchandise, and unlawful speculation.[10] French reformers wish to generalize this system and make it the ordinary procedure.

[8] CODICE DI PROCEDURA PENAL (1931) Art. 451, 416. Only where an *"expertise"* is ordered in the trial stage by the trial judge, may the defense put an expert on the stand to give his observations on the opinion of the official expert. But there is an absolute prohibition against any discussion between these experts. *Id.*, Art. 417.

[9] LAILLER ET VONOVEN, LES ERREURS JUDICIAIRES ET LEURS CAUSES (1897) 97 *et seq.*; TCHERNOFF ET SCHONFELD, L'EXPERTISE JUDICIAIRE EN MATIERE PENALE (1932) 101 *et seq.*; Lescoeur, *L'Expertise Contradictoire* (1905) 29 REVUE PENITENTIAIRE, 1216-1225.

[10] TCHERNOFF ET SCHONFELD, *op. cit. supra* note 9, 226 *et seq.*

An organization of expert testimony such as the French propose was provided by the Italian Code of 1914.[11] The discussions preceding the enactment of the Fascist Code of 1931 reveal no real dissatisfaction with its functioning. But it has been abolished, ostensibly to prevent experts for the defendant from deceiving the judges. According to the Fascist reformers, it is the defendant's expert who is most interested in concealing the truth. He is therefore reduced to a mere "technical consultant." His name and his rôle warn the judge that he is simply an auxiliary to the defense to whose conclusions no more importance should be attached than to the arguments of defense counsel.[12]

The proposed French system and the Italian system of 1914 in the organization of expert testimony, eliminates the fiction of impartiality upon which so much of European procedure is based. Defendants in European criminal procedure have fewer rights than in American procedure, due partly to the fact that judges perform many of the functions with which the parties are charged in this country. The judges are supposed to take an impartial view of the case, taking care of the interests of both prosecution and the defense. But it is extremely difficult for the European investigating magistrate or trial judge to avoid the psychology of the prosecutor who is a colleague, member of the same judicial corps. Most defendants are guilty anyway—in France 90 per cent of the defendants who come before the courts of first instance *(tribunaux correctionnels)* are found guilty—and judges soon conceive their functions in terms of demonstrating guilt. This attitude is easily transferred to the official expert who is in frequent contact with these magistrates. He, too, may easily conceive his rôle in terms of bringing in an opinion which is favorable to the prosecution. He, too, is interested in punishing the guilty and is aware that most defendants are found guilty. With such an attitude the dice are loaded against the defendant. Expert opinion is sought which is definitely hostile to him, and in the formation of it he has no control. Only when he is permitted to have an expert represent him on the same plane as the official expert will his interests be adequately protected.

It is apparent that France and Italy are as much beleaguered by the problem of expert testimony as is the United States. France wishes to introduce a contentious element in the organization of its *"expertise."* Italy banishes contentiousness because it tends to raise a doubt. Certainty can always be obtained if only one positive opinion is permitted. In America, where the expert as the auxiliary to the court is not altogether unknown, there is a desire to generalize this system, its proponents being obviously unaware of the difficulties Europe has experienced.

[11] CODICE DI PROCEDURA PENALE (1914) Art. 208, 211, 212.
[12] 8 LAVORI PREPARATORI (1929) 63-64.

THE COMPENSATION OF EXPERT WITNESSES

HORACE L. BOMAR, JR.*

Witnesses who attend trial at the command of the court and give testimony are entitled to compensation provided by statute, and to mileage fees, which likewise are regulated by statute. The expert,[1] who has given testimony, is, of course, entitled to this remuneration just as is any other witness. However, in most states this will amount to a relatively insignificant sum, ranging from fifty cents per day and mileage fees in Connecticut,[2] to $5 per day and mileage fees in certain populous counties of Michigan.[3] Obviously such compensation does not satisfy the expert witness, who, in most instances, is a highly trained and experienced man whose time and talents are valuable.

The problem presented would not be a particularly difficult one if experts were drawn entirely from one profession to give only one type of testimony. But the group is a large one. It is composed not only of physicians, surgeons, toxicologists and specialists in handwriting, but extends to "the great army of experts who are daily before the courts of the country testifying as to matters of civil engineering, insurance, printing, publishing and binding, mining and a dozen other occupations and callings which at least in some of their features involve matters beyond the scope of ordinary knowledge of the ordinary man."[4]

Likewise, services rendered by experts of the same type are by no means alike in all cases nor are they restricted to giving testimony on the witness stand. A physician, for example, may examine a person whose injuries have given rise to the litigation, conduct an autopsy or make a chemical analysis. Again, he may be called upon to study the facts and circumstances of the case before trial, so that he will be qualified to give a first-hand opinion on all the evidence. His constant attendance at court during the trial may be called for; in some situations the physician may even act

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[1] The expert witness, as distinguished from the ordinary witness, is one who has had special training or experience on a matter in issue. The ordinary witness is summoned to testify to facts which any other person in his position might give. He is called merely because of his personal knowledge of certain facts pertinent to the case before the court, and as a general rule will not be permitted to express his opinion. The expert, on the other hand, is called primarily for the purpose of securing his opinion.

[2] CONN. GEN. STAT. (1930) §2263.

[3] MICH. COMP. LAWS (1929) §15468.

[4] Wade, *The Office of the Expert Witness* (1904) 1 AM. L. SCHOOL REV. 225.

as medical counsel, advising the lawyer as to questions which he should ask in examining a witness on medical issues.[5]

Services rendered by the trained and experienced man as a *witness* on the stand also vary considerably. He may be called on merely to relate facts. In some instances this testimony will be in no wise different in character from that of any other witness;[6] in others, the facts may be such that only the expert would know or appreciate them.[7] In these latter situations, the special knowledge and training of the expert enable him to prove facts which the lay witness would entirely fail to grasp. However, the expert, in rendering an opinion and thus aiding judge and jury in determining the *significance of facts,* is playing his principal rôle. This opinion may sometimes be based on facts which are within his personal knowledge. Again, it may be given as an answer to a hypothetical question, embracing facts testified to by others.[8]

Since the compensation claimed will vary according to the measure and class of service performed, just what is done by the expert in each case should be kept in mind. It may be that he is called upon to act in only one of these capacities; more often, however, his aid consists of a combination of the different types of service. From the standpoint of compensation, however, the situations may best be classified with reference to whether the services have or have not been rendered on the basis of a contract with the party calling him.

COMPENSATION OF EXPERT IN ABSENCE OF EXPRESS CONTRACT

The question of the compensation of experts in the absence of an express agreement has been a bone of contention for some time, particularly with doctors. Practically all writers on medical jurisprudence, for obvious reasons, contend that it is unfair to exact services of the expert without provision for a reasonable fee.[9]

This problem may be brought before the court in two principal ways. As a general rule—in civil cases, at least—a witness will not be held in contempt for refusing to testify unless the statutory witness fees have been paid or tendered in

[5] The practice of acting as expert counsel and expert witness in the same case has been severely criticized. One lawyer remarks: "I have always argued there should be a clear line of distinction drawn between the functions of a medical expert witness and the functions of a medical expert counsel in a case. . . . That the same man, after having been employed and paid as a medical counsel, should go upon the witness stand and swear as a medical expert witness to tell the truth, the whole truth, and nothing but the truth, is a public scandal and one which lawyers and courts should not tolerate. 32 N. Y. BAR ASS'N REP. 392-393 (1909).

[6] Thus, a physician who fortuitously happened to see an automobile smash-up might be subpoenaed to tell his version of the accident.

[7] Thus, the physician who witnessed the automobile wreck could relate to the jury the type of injuries resulting and certain medical facts concerning them, whereas the ordinary witness could supply no such information.

[8] The witness may or may not have been familiar with these facts prior to the posing of the question.

[9] For citations of views to this effect, see RAPALJE, WITNESSES (1887) 533 n. 1.

[10] *Id.* §302 (3).

advance.[10] In refusing to testify[11] without tender of a reasonable fee in addition to that provided by statute, the expert may raise the question of whether he is liable to compulsory process unless a special fee is tendered beforehand. The court must either sustain him in refusing to testify or punish him for contempt.[12] The question of compensation is also raised where the expert testifies with or without objection and later sues for a fee in addition to that allowed the ordinary witness by statute.[13]

All courts agree that special services other than giving testimony on trial may not be required of the expert without payment or promise of a special fee, for such services are not within the duty of *any* witness. Hence, a professional man is entitled to demand adequate compensation before undertaking a chemical analysis, a post-mortem examination, or any other work which is done with a view to pronouncing a considered opinion upon particular circumstances of the case.[14] Likewise, after rendering these services, he is entitled to recover their reasonable value of the party at whose instigation he performed them.

Whether an additional charge may be demanded as a condition precedent to an obligation to give testimony on trial is a more perplexing problem. Usually a distinction between testimony as to fact and opinion evidence is made. A subdivision of factual testimony so as to differentiate between testimony concerning ordinary facts and facts which only the expert could satisfactorily prove might be made, but this is not usually done.[15] It seems to be generally held that it is the duty of the expert to testify as to facts albeit those facts would only be appreciated by the expert.[16] The expert witness, in the discharge of his duty as a citizen, is like any other person compellable to attend court in obedience to process, and testify as to what he may know, for the same statutory fees as other witnesses.

Where the expert refuses to give his *opinion* until some arrangement is made for a reasonable compensation, courts are not in agreement as to whether such refusal

[11] It is generally admitted that the expert has no right to refuse to *attend* court. He must obey the subpoena to the extent of putting himself in readiness to testify. See Hutchins, *The Compensation of Medical Witnesses* (1906) 4 MICH. LAW REV. 413, 413. *Cf. In re* Roelker, 1 Sprague 276 (D. Mass. 1854).

[12] The same question may also be put in issue by an appeal by one of the parties to the original suit, appellant contending that he was prejudiced in not having the testimony of an expert whom the trial judge refused to compel to testify. See Bradley v. Davidson, 47 App. D. C. 266 (1916); State v. Bell, 212 Mo. 111, 111 S. W. 24 (1908); State v. Teipner, 36 Minn. 535, 32 N. W. 682 (1887); Webb v. Lewald Coal Co., 214 Cal. 182, 297 Pac. 958 (1931).

[13] Although the question is usually raised in an action against the party calling the expert to recover a fee, it may also be raised when a party appeals from an order taxing costs.

[14] See *Ex parte* Dement, 53 Ala. 389, 397 (1875); Flinn v. Prairie County, 60 Ark. 204, 207, 29 S. W. 459, 460 (1895); Board v. Lee, 3 Colo. App. 177, 179, 32 Pac. 841, 842 (1893); 4 WIGMORE, EVIDENCE (2d ed. 1923) 684.

[15] In some cases the language used is so broad and ambiguous that it is impossible to tell whether the court is speaking of facts as well as opinion. See, *e.g.*, U. S. v. Howe, Fed. Cas. No. 15,404a (W. D. Ark., 1881); Sumners v. State, 5 Tex. App. 365 (1879).

[16] See Brown County v. Hall, 61 S. D. 568, 569, 249 N. W. 253, 253 (1933); Philler v. Waukesha County, 139 Wis. 211, 214, 120 N. W. 829, 830; 2 HAMILTON, A SYSTEM OF LEGAL MEDICINE (1894) 148; HERZOG, MEDICAL JURISPRUDENCE (1931) §104.

In England where an additional fee is allowed to experts for opinion evidence, one writer has intimated that the expert witness may be entitled to an additional fee for giving testimony as to *medical facts*. See (1933) 2 BRIT. MED. J. 627.

amounts to a contempt. In the early English case of *Webb v. Page*[17] a witness had been called by the plaintiff to testify as to the damage sustained by certain cabinet work and the expense necessary to restore or replace the injured articles. The witness having demanded compensation before testifying, Mr. Justice Maule, in deciding the point, said: "There is a distinction between the case of a man who sees a fact and is called to prove it in a court of law, and a man who is selected by a party to give his opinion on a matter on which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to fall within his own knowledge; without such testimony the course of justice must be stopped. The latter is under no such obligation; there is no such necessity for his evidence, and the party who selects him must pay him."[18] This case seems to have established the English common law rule which sustains the expert in refusing to give opinion evidence in the absence of an arrangement for the payment of an additional compensation.[19]

Some few courts in this country have followed the English rule.[20] An early American case endorsing this doctrine is *Buchman v. State*,[21] which holds that a physician or surgeon may not be required to testify as to his professional opinion without the compensation of a professional fee, and that his refusal to so testify unless so compensated is not a contempt.[22] American courts following this view have advanced the following arguments in support of their position: (1) The expert should be compensated for his loss of time, for time is especially valuable to him.[23] (2) The knowledge of the professional man is his property—his "stock in trade" where the expert is a physician or lawyer whose opinion is valuable to him as a primary means of livelihood[24]—and he should not be compelled to contribute it in

[17] 1 Carr. & K. 23 (1843). [18] *Id.* at 23-24.

[19] "In the very early days of English Practice it was customary to pay lawyers and physicians and possibly clericals and statesmen or others competent from position or study to give expert testimony in a case extra compensation for such services. And it is quite evident that the statute of 5 Eliz. ch. 9 merely formulated this pre-existing custom by providing that witnesses should be paid *according to their countenance and calling, a reasonable sum.*" Robbins, *Allowance of Extra Compensation for Expert Witnesses* (1908) 66 CENT. L. J. 37. This custom under the statute gradually narrowed itself down until the only experts who were given any extra compensation for their services were lawyers and doctors. For some time they received a guinea a day for loss of time. See Webb v. Page, *supra* note 17.

[20] Harvey v. Evansville Steam Packet Co., 8 Bliss 99, Fed. Cas. No. 6,179 (C. C. D. Ind. 1877); U. S. v. Howe, *supra* note 15; U. S. v. Cooper, 21 D. C. 491 (1893); Dills v. State, 59 Ind. 19 (1887); Buchman v. State, 59 Ind. 1 (1887); People v. Montgomery, 13 Abb. Prac. (N. S.) 207, (N. Y. 1872); Tiffany v. Kellog Iron Works, 59 Misc. 113, 109 N. Y. Supp. 754, (1908); Pennsylvania Co. v. Philadelphia, 262 Pa. 439, 105 Atl. 630 (1918). [21] 59 Ind. 1 (1877).

[22] This holding is expressly confined to physicians and others "whose opinions are valuable to them as the source of their income and livelihood." It was later nullified by a statute expressly providing that an expert witness is compellable to testify for the ordinary witness fee. See note 57, *infra*.

[23] See Buchman v. State, 59 Ind. at 3.

[24] U. S. v. Cooper, 21 D. C. 491, 493 (1893). See STRYKER, COURTS AND DOCTORS (1932) 166, where it is said: "The physician has as much right to be compensated for his store of goods, namely, his knowledge, as has the grocer for his cans of tomatoes or his green vegetables on his shelves. . . ." *Sed quaere* as to this analogy. When the grocer's cans or vegetables are taken, the taking leaves nothing of value to the grocer, whereas the expert's ability to render further opinions is unimpaired after one opinion has been exacted by the court.

the form of opinions without adequate compensation.[25] (3) A denial of reasonable compensation would place an undue burden on the most eminent members of a profession or trade, who, it is claimed, would be compelled to testify in an inordinate number of cases with only the compensation of the ordinary witness.[26] (4) In civil cases the expert is conferring a benefit on the individual litigant for which he should pay.[27]

Provisions of the federal and state constitutions have often been urged as compelling the adoption of the English rule. In the Constitution of Indiana in force at the time *Buchman v. State* came before the Indiana court, was a provision that "No man's particular services shall be demanded without just compensation."[28] The Indiana court concluded that exacting the expert's opinion amounted to a demand for "particular services."[29] A provision similar to the one above is not commonly found in state constitutions. The constitutional argument more frequently used is that an expert's opinion is his property, the taking of which without adequate compensation is a deprivation of property without due process—forbidden by both federal and state constitutions.

These arguments have been termed "specious,"[30] and the overwhelming weight of authority in the United States today, in the absence of statute or express agreement as to compensation, denies the existence of a right to special compensation for rendering an opinion. In a number of cases it is held that the expert may be declared in contempt of court if he persistently refuses to give expert testimony;[31] in others suit in *quantum meruit*[32] by the expert who has furnished opinion evidence has been defeated.[33] Many arguments have been advanced in support of this position—some

[25] Buchman v. State, *supra* note 21; Tiffany v. Kellog Iron Works, 59 Misc. 113, 114, 109 N. Y. Supp. 754, 755 (1908); U. S. v. Cooper, 21 D. C. 491, 493 (1893).

[26] Buchman v. State, 59 Ind. at 13: "If physicians and surgeons can be compelled to render professional services, by giving their opinions on the trial of criminal causes, then an eminent physician or surgeon may be compelled to go into any part of the state at any and all times, to render such services without other compensation than such as he may recover as an ordinary witness."

However, it would seem that the court might interpose as it has in England, to prevent this privilege from being used oppressively. See Raymond v. Tapson, 22 Ch. Div. 430 (1882).

One writer, believing that the burden of giving testimony would curtail time available for charity patients, terms the majority rule "anti-social." STRYKER, COURTS AND DOCTORS, 166. Another writer applies the same epithet to the minority rule. 3 CHAMBERLAYNE, EVIDENCE (1911) §2371.

[27] Pennsylvania Co. v. Philadelphia, 262 Pa. 439, 105 Atl. 630 (1918).

[28] IND. CONST. (1851) Bill of Rights, §21.

[29] 59 Ind. at 13. The court relied on Blythe v. State, 4 Ind. 525 (1853), holding that an attorney, appointed by the court to defend an indigent defendant could not be compelled to give his services without a reasonable compensation.

[30] 4 WIGMORE, EVIDENCE (2d ed. 1923) §2203.

[31] *Ex parte* Dement, 53 Ala. 389 (1875); Wright v. People, 112 Ill. 540 (1884); Dixon v. People, 168 Ill. 179, 48 N. E. 108 (1897); State v. Darby, 7 Ohio Dec. 725 (1886); Sumners v. State, 5 Tex. App. 365 (1879).

[32] For the lay reader, *quantum meruit* may be defined as the name of the formula for pleading an indebtedness founded on work done or services rendered, not under a special contract as to compensation, but under such circumstances that the law will imply a promise to pay the one performing the work or service *as much as he deserved*. See SHIPMAN, COMMON LAW PLEADING (3rd ed. 1923) §61.

[33] Clark County v. Kerstan, 60 Ark. 508, 30 S. W. 1046 (1895); Flinn v. Prairie County, *supra* note 14, Note (1895) 27 L. R. A. 669; McClenahan v. Keyes, 188 Cal. 574, 206 Pac. 454 (1922); Fairchild v.

to refute arguments of courts following the English rule; others to advance additional reasons for denying compensation in addition to that allowed the ordinary witness. Among them are the following: (1) Loss of time for which the expert witness claims to be entitled to extra compensation is a sacrifice that every witness must make, the hardship in the expert's case being no greater relatively than in the case of the ordinary witness,[34] and those urging additional compensation because of the value of the expert's time have been unduly influenced by English statutes placing lawyers and doctors in a preferred class.[35] (2) It is the *duty* of witnesses to give all testimony available to aid in the administration of justice.[36] (3) Although in giving testimony in civil actions the expert may incidentally be conferring a benefit on the individual litigant, he is primarily aiding the administration of justice in giving his opinion.[37] (4) It is, as a practical matter, impossible to draw a line between testimony as to fact, for which no extra compensation is paid, and testimony as to opinion rendered by an expert; indeed, it is argued by some that a witness' opinion is merely another "fact" for the consideration of the court,[38] and by others that all testimony as to the existence of facts is really opinion evidence—the opinion of the witness that certain facts are true.[39] (5) It is also impracticable to make a distinction between the different kinds of expert testimony in determining the appropriate remuneration.[40] (6) The payment of higher fees to experts would result in an

Ada County, 6 Ida. 340, 55 Pac. 654 (1898); Chicago & M. Ry. Co. v. Judge, 135 Ill. App. 377 (1907); Burnett v. Freeman, 125 Mo. App. 683, 103 S. W. 121 (1907); Main v. Sherman County, 74 Neb. 155, 103 N. W. 1038 (1905); Fonda v. Bolton, 6 N. J. L. J. 240 (1883); *In re* Yarlotte's Guardianship, 133 Okla. 3, 270 Pac. 321 (1928); Ealy v. Shelter Ice Cream Co., 108 W. Va. 184, 150 S. E. 539 (1929); Philler v. Waukesha County, *supra* note 16.

The question of the expert's right to special compensation may also be raised when a party appeals from an order taxing costs. See, *e.g.* Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442 (1889); *In re* Clark, 104 Mass. 537 (1870); Ulaski v. Morris & Co., 106 Neb. 782, 184 N. W. 946 (1921); Lyon v. Wilkes, 1 Cow. 591 (N. Y. 1823).

[34] See 4 WIGMORE, EVIDENCE §2203: "The hardship upon the professional man who loses his day's fees of fifty or one hundred or more dollars is no greater, relatively, than upon the storekeeper or the mechanic who loses his day's earnings of two dollars or ten dollars; each loses his all for the day; moreover, though the recoupment of the witness fee of one or two dollars is relatively greater for the mechanic, yet his risk of losing continued employment by enforced absence is greater than for the professional man, and more than equalizes the hardship to him."

However, a distinction should be made between the salaried employee and the professional man. Usually, the former (mechanic or storekeeper) will draw his salary without diminution, whereas the latter's absence from his work will normally mean a loss of income.

[35] Philler v. Waukesha County, 139 Wis. 211, 216, 120 N. W. 829, 831 (1909). See note 19, *supra*.

[36] *Ex parte* Dement, *supra* note 31. "Many courts take the attitude that it becomes a public duty for the expert witness to aid justice without expecting specific compensation therefor, just as they expect persons to perform jury duty, also sometimes at a definite loss for those compelled to perform it." SHEFFEL, MEDICAL JURISPRUDENCE (1931) 172.

[37] See Dixon v. People, 168 Ill. 179, 191, 48 N. E. 108, 111 (1897).

[38] "It would seem on principle . . . that, if from the witness' observation or from hypothetical facts stated to him he has consciously in mind, either knowledge or an opinion, such knowledge or existing opinion is a *fact* as to which he may be required to testify. . . ." Philler v. Waukesha County, 139 Wis. 211, 215, 120 N. W. 829, 830 (1909). See also Mayor of N. Y. v. Pentz, 24 Wend. 668, 675 (1840).

[39] See Correspondence between Frazer and Penrose, 50 U. OF PA. L. REV. 346 (1902).

[40] "The practical difficulty of discriminating between various kinds of experts and their earnings . . . would be serious, and would introduce confusion and quibbling into the law." 4 WIGMORE, EVIDENCE 681.

intolerable increase in the cost of litigation.[41] (7) The argument that to compel the giving of an expert opinion without payment of extra compensation is unconstitutional as a deprivation of property is met by a denial that the expert has a property right in his opinion. In support it is contended that knowledge of fact is as much a property right as an opinion based on fact, and that no one will contend that the ordinary witness may demand an extra fee for parting with a property interest.[42] (8) Finally, the followers of the rule of *Ex parte Dement,* a leading case denying a right to special compensation, have countered with a constitutional provision, found in most states, declaring that "in criminal prosecutions accused shall have the right to have compulsory process for obtaining witnesses in his favor."[43] It is contended that this right will be denied an indigent defendant who is unable to pay an expert's fee if the expert is allowed to withhold his opinion until a special fee has been assured.[44]

In most cases, however, no distinction is taken between civil and criminal cases in determining the duty of the expert to testify without extra emolument. Where the opinion of the expert is exacted for the ordinary fee, it seems to be generally held that this obligation exists in civil as well as criminal cases.[45] In both instances, the theory is that the witness is performing a public duty in aiding in the administration of justice. However, in Pennsylvania it is held that a witness cannot be compelled for the ordinary witness fee to testify in favor of a private litigant, though it is his duty to give testimony unreservedly in a criminal case.[46]

The question whether an expert could be compelled to testify at all upon questions of a scientific character, it has been observed,[47] was at first one of difficulty. However, as we have seen, in the majority of states the expert cannot, without being placed in contempt of court, refuse to testify, even though he is to receive no more than the ordinary witness' fee. In those states which confer on the expert the right to obtain extra compensation for his testimony a question of some difficulty remains as to the expert's rights if the reasonableness of the amount of remuneration he demands is disputed. However, it has been held that there is a duty to testify after "reasonable fees" beyond the statutory fees "have been tendered. . . ."[48] Certainly there should be no doubt on this point. To allow the expert to demand a prohibitive fee and refuse to testify would be to allow him to defeat justice by withholding testimony necessary for a proper determination of the case.

[41] See Flinn v. Prairie County, 60 Ark. 204, 207, 29 S. W. 459, 459 (1895).

[42] Dixon v. People, 168 Ill. 179, 192; 48 N. E. 108, 110 (1897). Various definitions have been given of "property." See PROPERTY RESTATEMENT (Am. L. Inst. 1929) Introductory Note. Since the term is such a flexible one, a statement that an opinion is property is hardly more than the statement of a result based on other considerations.

[43] See, *e.g.*, IND. CONST. (1851) §13, Art. 1; OHIO CONST. (1802) Art. VIII, §11; WIS. CONST., Art. I, §VII.

[44] See State v. Darby, *supra* note 31, at 726.

[45] Dixon v. People, 168 Ill. 179, 192; 48 N. E. 108, 110 (1897).

[46] Pennsylvania Co. v. Philadelphia, *supra* note 27.

[47] U. S. v. Cooper, 21 D. C. 491 (1893). [48] *Id.* at 493.

The collection of the fee due the expert after rendering his service presents something of a different question. When the expert presents a bill for services the party calling him must either have the charges taxed as costs or must pay the expert from his own resources. However, since the ultimate power to impose costs must be found in a statute, it is generally held that, in the absence of any statutory provision authorizing it, the compensation of experts beyond the regular witness fees is not a necessary disbursement and cannot be taxed as costs.[49] It is considered as having been incurred for the party's own benefit, and is no more a disbursement in the cause than the fees paid to an attorney.[50] Hence, in the absence of a statute allowing the expert additional compensation,[51] it seems that, as a general rule, he must look to the party calling him for any fee in addition to the per diem and mileage allowed the ordinary witness.

Of course, there can be no recovery against the party calling the expert in those jurisdictions which hold that opinions may be exacted without special compensation having been paid, provided the expert's claim is based on his service *as a witness*.[52] But all courts agree that where services other than testifying have been performed at the request of a party without any agreement as to compensation, an implied promise on the part of the litigant to pay a reasonable fee is found by the court, and a recovery sustained.[53] These services, however, must be performed at the request of a party or his attorney; where the expert voluntarily makes an investigation and is later called to the stand to reveal his findings, no additional compensation is allowed for the investigation.[54]

In jurisdictions following the minority rule it would seem that a recovery in *quantum meruit* would be allowed an expert whose only service consisted of giving opinion evidence.[55] In New York, however, where the expert is not bound to give his opinion without additional compensation, there is dictum in one case stating that the right to increased remuneration for testifying is waived if special compensation is not demanded at the outset. "It seems reasonable and should be the law," the court

[49] See Dixon v. People, 168 Ill. 179, 187; 48 N. E. 108, 109 (1897).

[50] LAWSON, EXPERT AND OPINION EVIDENCE (2d. ed. 1900) 319. Such a result is easily understood in view of the general principle that statutes which give costs are not to be extended beyond the letter, but are to be strictly construed. See Cadwallader v. Harris, 76 Ill. 370 (1875); 23 AM. & ENG. ENCYC. LAW 387.

[51] Such statutes are discussed subsequently, *infra*, p. 518. In the absence of express statutory provisions authorizing special fees to experts, it has been the practice in many states, in criminal cases, to make a proper compensation to experts summoned by the government or summoned by the defendant with the approval of the prosecutor. This is done under authority of certain statutory provisions authorizing the allowance of accounts for "necessary services and expenses." See ROGERS, EXPERT TESTIMONY §195; *In re* Clark, 104 Mass. 537, 543 (1870).

[52] See cases cited in first paragraph of note 33, *supra*.

[53] Flinn v. Prairie County, *supra* note 14; Gordon v. Conley, 107 Me. 286, 78 Atl. 365; Allegheny County v. Watt, 3 Pa. Sup. 367 (1928); 4 WIGMORE, EVIDENCE (2d. ed. 1923) 684; LAWSON, EXPERT AND OPINION EVIDENCE (2d. ed. 1900) 317.

[54] See Sumners v. State, 5 Tex. Cr. App. at 378.

[55] In this situation, the expert has performed a service which he was under no duty to perform. Cases on the precise point are lacking. See, however, Cohen v. Continental Casualty Co., 89 Pa. Sup. 367 (1928); U. S. v. Cooper, 21 D. C. 491 (1893).

declared, "that where one voluntarily testifies on request without insisting on compensation as a condition of giving his evidence, he should not afterwards hold the person on whose behalf he testified to more than the statutory witness fee."[56]

Not a few states have enacted statutes regulating the compensation of expert witnesses and authorizing or restricting the right to compensation in addition to that allowed the ordinary witness.[57] Most of the statutes authorize allowance of additional compensation. Some are restricted to special types of experts; others relate

[56] Tiffany v. Kellog Iron Works, 59 Misc. 113, 115, 109 N. Y. Supp. 754, 755-756 (1908).

[57] *Allowing Additional Compensation:*

CALIFORNIA. CAL. CODE CIV. PROC. (Deering, 1931) §1871. (Court may appoint experts and fix their compensation "for such services, if any, as [they] may have rendered, in addition to . . . their services as . . . witnesses. . . ." In criminal cases the compensation fixed is a charge against the county; in civil cases "such compensation shall . . . be apportioned and charged to the several parties in such proportion as the court may determine and may thereafter be taxed . . . as other costs." Other experts called by the parties "shall be entitled to the ordinary witness fees only. . . .")

Colo. Laws, 1933, c. 194 (Additional compensation allowed expert witnesses, amount to be fixed by court.)

CONN. GEN. STAT. (1930) §5259 ("Physicians shall receive a reasonable fee for services rendered in criminal cases".)

DEL. REV. CODE (1915) §4231 (Fees of experts witnesses are fixed by court in its discretion and taxed as costs.)

IOWA CODE (1931) §11329 ("Witnesses called to testify only to an opinion founded on special study or experience . . . or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, . . . not [to] exceed four dollars per day. . . .")

LA. CODE OF PRAC. (Dart 1932) §462 (Experts named by court in accordance with statutory scheme receive such compensation as court may determine, taxable as costs.)

ME. REV. STAT. (1930) c. 126, §7 (Court in its discretion may allow to expert witness a sum not to exceed $25 per day in taxing costs.)

3 MICH. COMP. LAWS (1929) §14223 (Person receiving or paying a larger fee than ordinary witness fee declared guilty of contempt unless court has awarded larger sum, as it may do, taxing such sum as costs.)

2 MINN. STAT. (Mason 1927) §7009 (Judge in his discretion may allow expert "such fees as in his judgment may be just and reasonable.")

N. C. CODE (Michie, 1931) §3893 ("Experts when compelled to attend and testify shall be allowed such compensation and mileage as the court may in its discretion order.")

R. I. GEN. LAWS (1923) §§5002-5005 (Appointment of experts by judge before trial on motion of party, provided party moving pays reasonable fees, as fixed by judge, to court, such fee to be taxed as costs. "In criminal cases, in the discretion of the court, on request of defendant, expert witnesses may be furnished for such defendant at expense of the state.")

S. C. CODE (1932) §4958 (Physicians called by state or bound over at the instance of defendant to testify as experts "in any case of felony" receive $5 in addition to ordinary witness fees, paid by the county where case is tried, provided trial judge certifies that the testimony of such expert is material.)

VT. GEN. LAWS (1917) §7443 ("In state causes, extra compensation may be allowed to expert witnesses only in case they have been previously selected, and their production ordered by a justice of the supreme court or a superior judge . . . and such compensation shall be fixed by the court.")

WIS. STAT. (1933) §357.12 (In criminal cases judge appoints expert "whenever . . . expert opinion becomes necessary or desirable," compensation to be fixed by court and paid by the county as costs. Person paying or receiving more than such award declared guilty of contempt. The parties may call other experts.)

WYO. REV. STAT. (1931) §89-1602 (Physician allowed $5 for half day or less and $10 for more than half day for testifying as expert before coroner.)

Denying Additional Compensation:

ALA. CODE (1928) §7713 (Expert must testify without payment or tender of compensation other than ordinary witness fees.)

IND. STAT. (Baldwin 1934) §310 (Expert must testify without tender or payment of compensation other than ordinary witness fees.)

MONT. CODE (1921) §4947 ("An expert is a witness and receives the same compensation as a witness.")

only to court-appointed experts.[58] Usually, the amount is left within the discretion of the court, although a maximum is stated by some statutes.[59] Three states, on the other hand, have statutes which expressly provide that the expert must testify for the ordinary witness' fee.[60]

The statutes authorizing the court within its discretion to award extra compensation give no right to the expert to withhold his testimony until he is assured that he will receive the special fee, but only make provision for compensation *after* testimony has been given or other service performed.[61] Furthermore, it has been held that such statutes do not apply to a witness to whom the facts are already known, merely because he possesses professional skill which may enable him to observe and recount those facts more intelligently.[62] Only the fee earned as a witness may be taxed under most statutes; one or two are broad enough to cover services other than testifying.[63] A question has arisen whether a witness must be appointed or summoned "as an expert" in order to be entitled to additional compensation under the statutes. Louisiana courts have held that the expert need not be summoned as such;[64] the Iowa court seems to have reached an opposite result.[65]

CONTRACTS FOR EXTRA COMPENSATION

Where the expert serves in a contested case, as a practical matter, he usually does so as the result of an agreement with an interested party in regard to his compensation. A subpoena may or may not be served. In the great majority of cases, doubtless, the expert performs the agreed service and is compensated according to the contract. But at times a question of the validity of the agreement between the expert and the party calling him does arise. While a contract providing special compensation for services other than testifying will be upheld if free from improper conditions, there is some doubt as to its validity when made simply to secure the testimony of the expert. Of course, in those jurisdictions recognizing the right of the expert to demand a special fee as a condition precedent to an obligation to testify, the agreement for extra compensation is enforceable.[66] However, where the expert may be compelled to give his opinion after tender of the ordinary witness' fee, a contract for extra compensation for testifying will not as a general rule be enforced.[67]

[58] See the Connecticut statute, *supra* note 57, for an example of the former type; the Rhode Island statute, of the latter.

[59] See Iowa and Maine statutes, *supra* note 57.

[60] See Alabama, Indiana, and Montana statutes, *supra* note 57.

[61] State v. Teipner, 36 Minn. 535, 32 N. W. 682 (1887).

[62] Anderson v. M., St. P. etc. Ry. Co., 103 Minn. 184, 114 N. W. 744 (1908); (1909) 22 HARV. L. REV. 235. The Michigan statute, *supra* note 57, expressly provides that provisions allowing special compensation shall not apply to witnesses testifying as to "established facts, or deductions of science. . ."

[63] See, *e.g.* Louisiana and Rhode Island statutes, *supra* note 57. *Cf.* the California statute, *ibid.*

[64] Suthon v. Lawes, 132 La. 207, 211, 61 So. 204, 206 (1913) McQueen v. Union Indemnity Co., 136 So. 761, 763 (La. App. 1931).

[65] *Cf.* Snyder v. Iowa City, 40 Iowa 646 (1875).

[66] Birch v. Sees, 78 App. Div. 609, 165 N. Y. Supp. 846 (1917).

[67] See Burnett v. Freeman, 125 Mo. App. 683, 691, 103 S. W. 121, 123 (1907); Klipper v. Klipper, 199 Mo. App. 294, 301, 202 S. W. 593, 595 (1918); Hutchins, *supra* note 11, at 429.

The claim of the expert is denied on the theory that no consideration is furnished by a promise by one to do what it is already his legal duty to do, and on the theory that such a contract is contrary to public policy.[68] Yet, if no subpoena is served upon the witness so that he comes into court in response to his agreement, it is said that there is consideration for the promise of compensation, which will be enforced.[69]

In many cases where there is a contract between litigant and expert, the expert does work in addition to giving testimony. In such a case, it is not likely that the expert will experience any difficulty in recovering the stipulated compensation, though the fee was promised primarily to secure testimony and the giving of testimony actually constituted the chief objective of the bargain. Since the court does not ordinarily inquire into the adequacy of the consideration where it exists[70] the disparity between fee and services would become material only if it were so great as to render the contract objectionable on grounds of public policy.

Courts have acted with unanimity in condemning any agreement by which the compensation of the expert is made contingent on or proportionate to a recovery.[71] The reason for such a policy is obvious. Such contracts smack of champerty and tend strongly to induce perjured testimony.[72] In fact they have been looked on with such disfavor that in one instance an attorney who negotiated a contingent fee contract with a doctor was disbarred.[73] In another instance the court recommended an investigation with a view to prosecution for contempt against a physician for collecting such a fee.[74]

NEED OF STATUTORY REGULATION

Aside from contracts which are illegal and invalid, much criticism has been leveled at the general system of obtaining and paying for expert testimony by contract between the expert and the party calling him. Experts, though theoretically the impartial advisers of the court, are said to be zealous partisans. Many are claimed to be mere "intellectual soldiers of fortune."[75] One writer has even stated that the enormous fee sometimes paid the expert is nothing short of bribery.[76] In any event

[68] Burnett v. Freeman, 125 Mo. App. at 691; Collins v. Godefray, 1 Barn. & Ad. 950, 952 (1831).

[69] See Dodge v. Stiles, 26 Conn. 463, 466-467 (1857); Walker v. Cook, 33 Ill. App. 561, 565 (1889). In such a situation, the expert is not under a legal duty to testify.

[70] 1 WILLISTON, CONTRACTS (1926) §115.

[71] Miller v. Anderson, 183 Wis. 163, 196 N. W. 869 (1924); Pollok v. Gregory, 9 Bosw. 116 (N. Y. 1861); Sherman v. Burton, 165 Mich. 293, 130 N. W. 667 (1911); LAWSON, *op. cit. supra* note 50, at 319.

[72] "The plaintiff's interest in the amount of the recovery will furnish a powerful motive for exaggeration, suppression, and misrepresentation—a temptation to swell the damages so likely to color his testimony as to be inimical to the pure administration of justice and therefore invalid." Sherman v. Burton, 165 Mich. 293, 297, 130 N. W. 667, 668 (1911). In case of attorneys, the courts, influenced by a desire to enable the poor litigant to prosecute his claim, have permitted the client to make a contract by which the attorney's fee is contingent upon success in the cause. See Schofield, *Medical Expert Testimony; Methods of Improving the Practice* (1910) 1 J. CRIM. L. AND CRIMIN. 41, 51.

[73] Matter of Shapiro, 144 App. Div. 1, 125 N. Y. Supp. 642 (1911).

[74] See Davis v. Smoot, 176 N. C. 538, 541, 97 S. E. 488, 489 (1918).

[75] See Westenhauser, *The Expert Witness* (1905) 67 ALBANY L. J. 2, 7.

[76] Rice, *The Medical Expert as a Witness* (1898) 10 GREEN BAG 464, 466. Another writer says, "To the jury an expert is an expert—a kind of intellectual prostitute ready to sell his opinions and enlist his

it is undoubtedly true that expert evidence has largely fallen into discredit, and a principal feature of the breakdown seems to be the distrust of the expert witness, as one whose testimony is shaped by his bias for the party calling him.

The persistent agitation for reform of our system of expert testimony has been fertile in proposals for change[77] but has yielded few statutes,[78] and, except in limited fields,[79] these seem not to have been significantly successful. It is hardly within the scope of this discussion to consider these plans in their entirety. However, the problem of compensation has been dealt with in most proposals for change and might well be singled out for special legislative consideration, for practically all proponents of reform agree that the amount and manner of the expert's compensation constitutes one of the chief abuses of the present system. The bias of the expert witness is undoubtedly due, in part, to the payment of a special fee by one of the parties litigant. In many situations the likelihood of partisanship is enhanced by contracts in which the fee of the expert is made contingent on a recovery.[80] Even where there is no express condition in the contract, in many cases the effect is the same, for the ability of the litigant to pay will in many instances depend almost entirely on a recovery in the suit before the court.

Today, of the states having statutes which in one way or another expressly regulate the compensation which the expert is to receive, most, as has been observed,[81] make the allowance of a special fee possible. Such statutes, however, are designed to pro-

services for the side that pays him." Friedman, *Expert Testimony, Its Abuses and Reformation* (1910) 19 YALE L. J. 247.

[77] Court appointment of expert has long been advocated. Some would have the judge appoint the experts on motion of parties or on his own motion from a panel of experts previously selected by the local medical society, or some similar professional group. Others would not so limit the judge. Dean Wigmore strongly believes that the expert should be summoned by the court and compensated by state or county. See 1 WIGMORE, EVIDENCE §563. Practically all would permit the parties to call additional experts.

The creation of an auxiliary panel of jurors, composed of experts, has been proposed, from which expert jurors would be drawn for cases involving scientific issues. See 1 WIGMORE, EVIDENCE §563.

A scheme has even been proposed for a joint management of the trial by the judge and an expert presiding with him, the latter to direct and control the examination of expert witnesses and to sum up the expert testimony before the judge's charge, subject to interrogation by counsel as to all points not previously developed. For a discussion of all the above schemes, see Endlich, *Proposed Changes in the Law of Expert Testimony* (1898) 32 AM. L. REV. 851; see also McDermott, *Needed Reforms in the Law of Expert Testimony* (1911) 1 J. CRIM. L. & CRIMIN. 698; Schofield, *supra* note 72; 1 WIGMORE, EVIDENCE §563.

A number of model bills have been proposed. Proposals in Massachusetts, Maine, and New York for legislation authorizing court appointment of experts are discussed in Friedman, *supra* note 76. The New York and Maine bills, with accompanying discussion, are found in (1910) 32 N. Y. ST. B. A. REP. 377 *et seq.* See Melcher, *Developing and Regulating Expert Testimony* (1917), 24 CASE AND COMMENT 381, for a discussion of a Pennsylvania bill for court appointment of experts. The foregoing bills failed to pass.

[78] See the Michigan, Wisconsin, California, Rhode Island, and Louisiana statutes cited in note 57, *supra*.

[79] Statutes providing for pre-trial psychiatric examination of criminal defendants have proved effective. See Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants before Trial*, *supra* p. 419.

[80] Whether or not an agreement of this kind is valid, it is one that is constantly made and carried out. See Hutchins, *supra* note 77, at 429.

[81] *Supra* p. 518.

tect the expert, not to remedy the abuses of the fee system. Conceivably, an act might be passed placing the expert under an obligation to testify for the ordinary witness fee, and making it a criminal offense to pay or receive additional compensation.[82] Regardless of preference for majority or minority rule, such a drastic limitation, with criminal sanction, on fees which may be paid raises grave difficulties. A denial of extra compensation puts a serious financial burden on honest experts, especially on those whose income is dependent on professional services. Furthermore, such a rule is easy of evasion so long as fees for services other than testifying are not covered by the act since the venal expert can always arrange to perform additional tasks and secure compensation therefor, which, although disproportionate, could not be proved to be such in criminal proceedings. And if fees for these services were not allowed, the whole system of expert testimony would break down since experts would refuse to make preliminary studies and examinations and could not be compelled to do so.

If regulation is to be desired and if the above difficulties are to be avoided, then it would seem that a model statute should make possible the award of an additional fee to experts, the amount of which should be within the discretion of the court. Compensation for preliminary services should be embraced by the fee. Statutory maxima seem defensible, if at all, only where the fee is limited to compensation for testifying. After provision is made for the allowance of an adequate fee, the statute should then make it a criminal offense to contract for additional emolument. Michigan and Wisconsin seem to be the only states, at present, with statutes containing the latter provision. An expert witness receiving or any person paying a sum larger than the amount awarded by the court is made guilty of contempt of court and, upon conviction, subject to fine or imprisonment, or both.[83] Another form of regulation which might prove effective would be to forbid the introduction of expert testimony until the expert's fee has been made known to the court and approved by it.[84]

Yet it is doubtful that the alleged partisanship of expert testimony is due in many cases to witnesses who have sold out to the highest bidder. There are some self-styled experts who are prepared to say anything for a fee, but it is notable that the vast majority of experts are honest. Much of the partisanship, perhaps, is due to an unconscious striving by the witness to support the cause of the party who will pay his fee, be it large or small.[85] For this reason, payment of the expert out of the

[82] The statutes of Alabama, Indiana, and Montana, *supra* note 57, provide that the expert can be compelled to testify for the ordinary witness fees, but place no restriction on what a party *may* pay him.

[83] *Supra* note 57. A model bill proposed by McDermott, *supra* note 77, at 111, contains such a provision. Likewise, the Committee on Jurisprudence and Law Reform of the American Bar Association also recommended that this provision be included in expert testimony legislation. See (1926) 51 A. B. A. REP. 428, 437.

[84] The exclusion of expert evidence of a witness who has been paid or expects to receive anything except the fees prescribed by law for his attendance at court has been suggested "by a judge of ability and much experience." See Bartlett, *Medical Expert Evidence: The Obstacles to Radical Change in the Present System* (1900) 34 AM. L. REV. 1, 7. This plan seemingly would allow the expert no fee above the ordinary witness fee unless a statute allowed special compensation.

[85] It has been said that the expert is "as capable as anyone else of persuading himself that he believes what he wants to believe." See PSYCHOLOGY IN COURT BY A DOCTOR (1933) 52.

public treasury has been strenuously advocated by certain groups.[86] Certainly it seems desirable that experts should not depend upon the parties for their emolument if they are to fulfill their office of impartial advisors or *amici curiae*, but a plan whereby they are to be paid out of the public funds is not altogether feasible. Expert testimony is costly.[87] It goes without saying that a stringent restriction on the number of experts would be necessary; without it, any proposal to have them publicly compensated would be absurd. Even with such a limitation, the expense of paying experts might still prove an intolerable burden for the machinery of justice. If the estimate that experts are employed in sixty per cent of the more important cases[88] even approaches accuracy, their compensation out of the public purse would add hundreds of thousands of dollars to the burden of taxation in most states.[89] This of itself may not be a conclusive argument, but, as one judge aptly said, "its weight cannot be disregarded in considering the practicability of the plan."[90]

Some modified form of public payment might be tried. In those states adopting a system whereby experts may be appointed by the court on its own motion or at the request of the parties, the state or county could compensate the court-appointed expert, other expert witnesses being called at the expense of the party desiring them.[91] However, such a plan is still objectionable in that it leaves the problem of compensation unsolved as to those experts who will still look to the parties litigant for payment.

To make payment of the expert's compensation independent of the parties and yet relieve the public of the burden, a statute might require a litigant to give advance notice of an intention to call the expert, and require him to pay or give bond for

[86] Endlich, *supra* note 77, at 862; Note (1910) 1 J. CRIM. L. & CRIMIN. 125. See, also, bills proposed for Maine and New York discussed by Friedman, *supra* note 76, at 250, and changes advocated by the standing Committee on Jurisprudence and Law Reform of the American Bar Association, (1926) 51 A. B. A. REP. 428, 435. Public compensation of experts has also been advocated on the ground that it is a boon to the poor litigant, (1910) 32 N. Y. ST. B. A. REP. 428, 398.

[87] See remarks of Judge Davy in opposition to statute proposed for New York providing for public payment of expert medical witnesses. *Id.* at 398.

[88] WELLMAN, ART OF CROSS EXAMINATION (1929) 60. Schofield states that in Suffolk County (Mass.) about 600 out of 1146 cases tried in the superior court during the year ending in June, 1909, were personal injury suits. "One or more medical experts," he says, "testify in almost every personal injury case." Schofield, *supra* note 72, at 44.

[89] The amount would be even more staggering if the parties are to be relieved of payment for services by experts other than testifying. And yet, if the expert is privately paid for such services, there is still the incentive for partisan testimony.

[90] Justice Willard Bartlett, *supra* note 84, at 10.

[91] The framers of the California statute, *supra* note 57, apparently intended to limit the compensation of experts called by the parties to ordinary witness fees, but there is no criminal sanction to enforce this provision. This is also true of the bill proposed by the American Bar Association Committee which provides: ". . . 3. The court shall have power to fix the amount of the compensation to be paid to expert witnesses for their services, and the amount thus fixed shall be paid by the state; and the witness so called shall receive no other compensation." See (1926) 51 A. B. A. REP. at 437. The same plan was embodied in a bill prepared by the Massachusetts Medical Society and the Boston Bar Association. *Id.* at 440.

the expert's fee (as fixed by the judge)—at least, in civil cases—to the court before trial. The court would then pay the expert upon termination of the litigation.[92]

Despite the difficulties intrinsic to reform in this field, there are suggestions in existing statutes and the numerous proposals for reform which, if properly utilized, should go far toward enabling bar associations and judicial councils to frame measures which will so regulate the compensation of expert witnesses as to restrain the corrupt expert and his lawyer accomplices without impairing the important contributions which the unbiased expert can render in the administration of justice.

[92] This seems substantially the plan of the California act, except that it seemingly provides additional compensation only for services other than testifying and no advance notice is required. The Rhode Island statute provides for the appointment of experts by the judge, provided the party moving for appointment pays reasonable fees, as fixed by the judge, to the court, the amount so paid to form part of the costs. See statutes cited in note 57, *supra*.

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